commission of which is necessarily included within that with which he is charged in the . . . information." RCW 10.61.006. An instruction on a lesser offense is warranted when: (1) each element of the lesser offense must necessarily be proved to establish the greater offense, and (2) the evidence in the case supports an inference that the lesser offense was committed. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). While the jury was not specifically instructed that premeditated first degree murder was a "lesser included offense" of aggravated first degree murder, the jury was nevertheless instructed to consider the crime of aggravated murder only if it found the defendant guilty of first degree premeditated murder. This is sufficient under Beck.

In Beck, the Court invalidated a state statute that prohibited giving any lesser included offense instruction in capital cases even though such instructions were available in non-capital cases. In addition, the jurors in Beck were instructed that if they found the defendant guilty, they were required to impose the death penalty. Beck, 447 U.S. at 639 n. 15. The jury in Beck was presented with only two options: to convict the defendant of a capital crime, in which case they were required to impose the death penalty, or to acquit. Beck, 447 U.S. at 627; see also Hopkins v. Reeves, 524 U.S. 88, 95, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

The Court's fundamental concern in Beck was that "a jury convinced that the defendant had committed some violent crime but not

convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." Schad v. Arizona, 501 U.S. 624, 645-47, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); see Beck, 447 U.S. at 642. In Schad, the jury was given the "third option" of finding the defendant guilty of the lesser included noncapital offense of second degree murder. The Schad Court found that Beck did not apply: "The goal of the Beck rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." Schad, 501 U.S. at 647. The Schad Court concluded Beck did not apply because the jury was not faced with this "all-or-nothing" choice but had the third option of a non-capital offense. Schad, 501 U.S. at 647.

Similarly, in this case, the jury was not faced with an "all-or-nothing" choice between a conviction of aggravated murder and acquittal. The jury was instructed to first determine whether the defendant was guilty of first degree premeditated murder. Only upon finding him guilty was the jury to proceed to determine whether any aggravating circumstances were present. Under the court's instructions, the jury could have found the defendant guilty only of first degree premeditated murder without any aggravating factors. Moreover, unlike in Beck, the jury was

not compelled to fix the penalty at death upon finding the defendant guilty of aggravated murder. Instead, the court held a bifurcated sentencing proceeding during which additional evidence was heard. This case is distinguishable from Beck. While the jury was not specifically told that first degree murder was a lesser included offense of aggravated first degree murder, it was implicit in the court's instructions that first degree was a less serious crime in that it involved commission of a base crime without any "aggravating factors."

The defendant's claim places form over substance because the jury *was* permitted to convict him, if it had so chosen, of a lesser offense. The defendant cannot establish an Eighth Amendment violation, and his claim should therefore be rejected.

8. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING THE EXPERT TESTIMONY OF MARK SAFARIK REGARDING CRIME SCENE ANALYSIS.

The defendant argues the trial court abused its discretion in admitting testimony from Mark Safarik, an expert witness on crime scene analysis. The expert testimony was properly admitted under ER 702 because it was relevant and helpful to the jury on the identity of Mercer's and Ellis's murderer and on the aggravating sentencing factor of common scheme or plan.

Expert testimony is admissible under ER 702 if the witness qualifies as an expert and if his or her testimony would be helpful to the trier of fact. State v. Cauthron, 120 Wn.2n 879, 890, 846 P.2d 502 (1993). A trial court's decision to admit evidence under ER 702 is reviewed under the abuse of discretion standard. State v. Russell, 125 Wn.2d 24, 69, 882 P.2d 747 (1994).

The trial court entered a written finding that Safarik qualified as an expert and possessed "specialized knowledge in the fields of crime scene investigation, analysis, and linkage assessment." CP 3243. Safarik has been with the FBI for over 18 years, and has extensive experience in crime scene analysis. RP 6840-42. The defendant has not challenged the trial court's finding that Safarik is an expert in his field, and the unchallenged finding is therefore a verity on appeal. See State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The trial court also entered a written finding that Safarik's testimony "would be helpful to the jury in understanding the crime scene evidence, signature, and linkage assessment." CP 3243. The subjects of Safarik's testimony were beyond the common understanding of non-law enforcement personnel. Linkage assessment involves analyzing crime scenes to determine if there are enough different and unique aspects to a behavior manifested at a crime scene to determine if the behavior at one

crime scene is linked to another crime scene. RP 6846-47. A "signature" is a unique collection of behaviors that reoccur over time within different crime scenes. RP 6864. A "serial killer" is an individual who has engaged in the killing of three or more individuals with a period of time that has elapsed between the homicides. RP 6948. Safarik's testimony was helpful to the jury in understanding the crime scene evidence, how the evidence showed that one serial killer was at issue, and how the perpetrator developed and refined his methodology over time. The defendant has not assigned error to the trial court's finding that Safarik's testimony would be helpful to the jury. This finding is therefore a verity on appeal. See, Hill, 123 Wn.2d at 644. Safarik's testimony met the requirements of ER 702, and the trial court acted within its discretion in admitting it.

The defendant argues that Safarik gave an improper opinion of guilt when he testified to an opinion that the same person who committed the Spokane cases also committed the Pierce County murders. This contention should be rejected under State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994). The defendant in Russell argued that experts improperly gave opinions on the ultimate question of guilt when they testified to the opinion that based on their crime scene analysis, the same person committed all three murders at issue in the case. Russell, 125 Wn.2d at

70-3. The court observed that the purpose of showing identity under ER 404(b) is to demonstrate "the probability that the same person committed the crime." Russell, 125 Wn.2d at 73. "Having found the expert testimony admissible to show identity, we will not rule inadmissible the inference to be drawn from such evidence." Russell, 125 Wn.2d 24, 72-73, 882 P.2d 747 (1994).

As in Russell, Safarik's expert testimony was relevant to show identity, *i.e.*, that analysis of the crime scene evidence indicated the same person who committed the Spokane murders also murdered Ellis and Mercer. He never testified to an opinion that *Yates* committed the murders. Instead, he made a logical and permissible inference based on the analysis of the crime scenes that the same person who committed the Spokane murders also committed the Pierce County murders. This testimony was permissible under Russell.

The defendant nevertheless argues Safarik's testimony was not admissible because Yates "never placed his identity at issue" at trial. Yet Yates's argument ignores the fact that he did *proceed to trial*, which required the State to prove each element of the crimes beyond a reasonable doubt, including the identity of the killer. See State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The State had the burden of proving at trial that Yates was in fact the person who murdered Ellis and

Mercer. Safarik's testimony was relevant on this issue and properly admitted.

The defendant argues that "Safarik proffered impermissible propensity evidence: Mr. Yates committed the murders in Spokane County, ergo he committed the Pierce County murders." Brief of Appellant, at 143. The trial court, however, gave a specific limiting instruction to the jury regarding Safarik's testimony just prior to his testimony:

> . . . evidence will be introduced by the State on the subject of the Spokane murders for the limited purpose of attempting to prove a common scheme or plan and for purposes of attempting to prove motive, opportunity, identity, preparation, or premeditation. *You must not consider this evidence for any other purpose in this case, which involves the deaths of two people in Pierce County.*

RP 6839 (emphasis added). The court also provided a similar written instruction to the jury.[20] A jury is presumed to have followed the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 5 (1982). The

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[20] The court's instruction to the jury reads as follows:

> Evidence about the murders in Spokane County has been presented by the State during this trial for the limited purpose of assisting you in deciding whether the State has prove that the murders in Pierce County were part of a common scheme or plan. That evidence has also been presented by the State to prove premeditation, identity, motive, and preparation. You must not consider the evidence for any other purpose.

CP 4107.

court correctly instructed the jury, and the jury did not consider Safarik's testimony for improper purposes.

Finally, the defendant argues that in the event the court finds Safarik's testimony was admitted in error, that any such error was not harmless. The court will not reverse a conviction based on an error in admitting evidence that did not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004)(citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Where the error is from violation of an evidentiary rule rather than a constitutional mandate, the court does not apply the more stringent "'harmless error beyond a reasonable doubt'" standard. Bourgeois, 133 Wn.2d at 403. Instead, the court applies "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403.

The evidence of the defendant's guilt was overwhelming in this case, and the defendant therefore cannot establish prejudice. With regard to Mercer, DNA analysis linked Yates to the sperm found in Mercer's vagina and anus. DNA analysis also linked Mercer to a blood stain on Yates's jacket. Records recovered from his home indicated that Yates was

in the Tacoma area when Mercer was last seen alive. Yates used the same gun on Mercer as he had on Maybin, Oster, Wason, and Johnson.

With regard to Ellis, DNA analysis linked Ellis to a blood stain in Yates's Ford van. Yates used the same gun to kill Ellis as he used to shoot Smith and kill Murfin. Finally, records recovered from his home indicated that Yates was in the Tacoma area during the time period Ellis was last seen alive.

With regard to the aggravating factor of common scheme or plan, the evidence is again overwhelming that Yates killed both Mercer and Ellis pursuant to an overarching plan that he used repeatedly to perpetrate separate but very similar crimes. The plan involved luring drug addicted women who worked in prostitution into his vehicle to negotiate a sex act, killing the women with a small caliber handgun by shooting her in the head, encasing her head in plastic bags to prevent soiling his vehicle with blood, undressing her body for purposes of finding money, and dumping the corpse in a secluded area.

Evidence establishing each component of this plan was admitted independent of Safarik's testimony, through witnesses who testified about the crime scenes, through physical evidence recovered from the crime scenes and autopsies, and through expert testimony regarding DNA analysis and ballistic. Safarik analyzed this evidence and testified to his opinion regarding what the evidence showed with respect to the killer's

identity and the development of his methodology. But the independent evidence underlying Safarik's opinion remains overwhelming in showing Yates's overarching plan and how he killed Mercer and Ellis pursuant to this plan. Even if the court somehow finds the trial court erred in admitted Safarik's testimony, any such error was harmless and did not result in prejudice to the defendant.

9. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING EXPERT TESTIMONY REGARDING THE PROSTITUTION SUBCULTURE.

The defendant argues the trial court erred in admitting expert testimony from Lynn Everson regarding the prostitution subculture in Spokane. The trial court acted within its discretion in admitting this testimony because Everson qualified as an expert and her testimony was helpful to the jury.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge*, skill, *experience,* training, or education, may testify thereto in the form of an opinion or otherwise." ER 702 (emphasis added). The decision to admit expert testimony rests within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990). "If the reasons for admitting or excluding

the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal." Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979).

The court applies a two-part test under ER 702: (1) does the witness qualify as an expert, and (2) would the expert testimony be helpful to the trier of fact? State v. Cauthron, 120 Wn.2d 879, 890, 846 P.2d 502 (1993). Everson's testimony regarding the prostitution subculture in Spokane was helpful to the jury. An expert witness may testify regarding criminal behavior that is not ordinarily familiar to the average layperson, as in the case of the modus operandi of persons involved in prostitution. U.S. v. Long, 328 F.3d 655 (D.C. Cir. 2003), cert. denied, 540 U.S. 1075 (2003). Her testimony was not about matters ordinarily familiar to the average layperson. The defendant does not contest this point.

Everson testimony also met the requirement that she qualified as an expert. The record reflects she had worked for 13 years as an outreach worker for prostitutes with the Spokane Regional Health District AIDS Program. RP 4416. She ran the needle exchange program and had personally provided prostitutes with such things as condoms, warm clothing, food, and referrals for counseling and medical treatment. RP 4417-18. During her career, Everson has worked with about 300 people who were involved in prostitution, and she gained the trust and friendship of many of these individuals. RP 4419, 4421. Practical experience is sufficient to qualify a witness as an expert. State v. Ortiz, 119 Wn.2d 294,

310, 831 P.2d 1060 (1992). The trial court acted within its discretion in finding she was an expert based on her practical experience.

This conclusion is supported by State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991), reversed on other grounds, 120 Wn.2d 196 (1992). In Simon, the Court of Appeals upheld the trial court's admission under ER 702 of testimony from a police detective regarding the relationships between pimps and prostitutes in a prosecution for promoting prostitution. The detective testified regarding the psychological force employed by pimps, how prostitutes generally have very little or no self-esteem, and how pimps maintain their control or access to women who become prostitutes. Simon, 64 Wn. App. at 954-55. The detective had over six years of experience and had investigated over 400 prostitution related crimes. Simon, 64 Wn. App. at 963. The court held that the detective qualified as an expert because of his practical experience, even though he had not done any formal course work in the area. Simon, 64 Wn. App. at 954. Similarly, Everson qualified as an expert because of her experience in assisting and interacting on the job with individuals working in prostitution.

The defendant argues Everson did not qualify as an expert because she had never been a prostitute herself or had never accompanied a prostitute on the job. This argument should be rejected. Under ER 702, an expert need not have acquired his or her knowledge through personal experience. State v. Campbell, 78 Wn. App. 813, 823, 901 P.2d 1050

(1995). In Campbell, the court held that expert testimony from police officers about gang culture was properly admitted even though the officers were not "from the same neighborhood, city or county" as the gangs about which they testified. Campbell, 78 Wn. App. at 823. Also, there was no indication in Campbell that the officers themselves had been gang members at one time to qualify as experts on gang culture. Similarly, in this case, Everson did not have actual experience working as a prostitute, but she had practical experience working as an outreach worker with over 300 prostitutes over the course of 13 years. The trial court properly admitted her testimony.

The defendant argues Everson's testimony was not proper under ER 406, which defines the scope for the admissibility of "habit" evidence. But the court admitted Everson's testimony as expert testimony under ER 702, not as "habit" evidence under ER 406. Everson's testimony met the requirements of expert testimony under ER 702 because she qualified as an expert and her testimony was helpful to the trier of fact. Whether or not her testimony also met the requirements of ER 406 is not at issue. The trial court acted within its discretion in ruling Everson's testimony was admissible under ER 702.

Even if the defendant could somehow show that Everson's testimony was admitted in error, he cannot show that any such error should result in a new trial. The court will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. State

v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004)(citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Where the error is from violation of an evidentiary rule rather than a constitutional mandate, the court does not apply the more stringent "'harmless error beyond a reasonable doubt'" standard. Bourgeois, 133 Wn.2d at 403. Instead, the court applies "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403.

The defendant argues that Everson's testimony regarding how prostitutes try to get the money up front before performing the negotiated sexual act was used as "the primary evidence" of the State's theory that Yates murdered Mercer and Ellis during the course of robbing them. This is incorrect for two reasons. First, evidence that specific items were missing from the individual victims, such as Mercer's purse or Ellis's shoe, supported the State's theory that Yates had robbed them. Second, Everson's testimony regarding how prostitutes try to get the money up front was cumulative of other evidence admitted without objection at trial. For example, Jessica Kleiner, a prostitute who worked with victim Heather Hernandez, testified regarding how a "car date" worked:

> Usually a John or a trick will pull up to you. They are usually aware that you are out there working and they are looking for action or whatever. And you get in a car and you usually talk to them and you find out how much money they have and what they want for that service. If an agreement is made, you go find a place to park *and you get your money* and you do the service.

RP 4682 (emphasis added). This testimony was admitted without objection.

Moreover, Everson's testimony was corroborated by various witnesses called by the defendant during his case-in-chief. These witnesses testified without objection that when they went on prostitution dates with Yates or others, they got the money up front before performing the sexual act. RP 7031, 7033, 7054, 7063, 7074. One such defense witness testified as follows during direct examination:

> Q: When you were working as a prostitute, did you learn to get the money up front?
> A: Yeah.
> Q: And that's to make sure that you'd actually get it?
> A: Right.

RP 7067. The defendant cannot show error or prejudice with regard to Everson's testimony.

The trial court properly admitted Everson's testimony under ER 702. The defendant has failed to show either error or prejudice with respect to her testimony.

10. THE TRIAL COURT ACTED WITHIN ITS DISCRETION REGARDING FUNDING FOR A DEFENSE EXPERT ON PROSTITUTION.

The Sixth Amendment and article I, § 22 of the Washington State Constitution guarantee a criminal defendant the right to present witnesses to establish a defense. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant who is financially unable to obtain expert or other services necessary for an adequate defense may raise a motion to the court for the funding of such services. CrR 3.1(f)(1). The court shall authorize such services if it finds: (1) the services are necessary, and (2) that the defendant is not financially able to obtain them. CrR 3.1(f)(2).

The appointment of an expert at public expense is required under this rule only when necessary to an adequate defense. State v. Young, 125 Wn.2d 688, 692, 888 P.2d 142 (1995). The trial court's determination as to whether the services are necessary lies within the sound discretion of the trial court and will not be overturned on appeal unless the defendant establishes substantial prejudice. Young, 125 Wn.2d at 691. A discretionary decision of a trial court "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The defendant contends the trial court erred when it denied his request for funding of an expert to testify on prostitution. This argument should be rejected. The defendant failed to meet his burden of showing the services were necessary for an adequate defense. The defense never established that its proposed witness would testify to information that was not cumulative of the State's expert's testimony.

Prior to trial, the State had informed the defense that it would call Everson as an expert witness to address the practices of women who were working in prostitution. RP 852-3. The defense then raised an ex parte motion for public funds for its own expert on prostitution. RP 852; CP 4878-84. During an ex parte hearing on the motion, the defense attorney explained to the court:

> And we wanted Mr. Parker. . . to give [his] insight into women's behavior that are working on the street. And it relates to the aggravator primarily of robbery, and it addresses whether or not women typically carry purses, carry money, those kinds of things.

RP 852. The trial court inquired whether there was a difference of opinion between the experts. RP 853. The defense attorney answered, ". . . I don't think there is a lot of difference in opinion in general about. . . how these women operate." RP 853. The defense attorney stated that she had "already disclosed to [the State] that [Mr. Parker's] testimony would be similar to [the testimony from the State's experts]." RP 854-55.

The court denied the request for funding "at this time," indicating that it wanted "more information" as to areas of expert opinion that Mr. Parker could offer to the jury that could not otherwise be explored with the other witnesses. RP 854. The court entered a written order indicating the request was "Denied *at this time subject to further hearing or information.*" CP 2511 (emphasis added); RP 855. The defense never raised this issue again with the court. Nor does the record reflect that the defense ever found an expert whose testimony would have differed from Everson's testimony, or who otherwise would have provide other relevant information for the case.

The court invited the defendant to supplement the record, but the defendant never did so. The defendant failed to identify specific non-cumulative evidence the expert could have addressed or rebutted. Moreover, he does not claim there was any likelihood that an expert would have materially assisted defense counsel in the preparation or presentation of his case. Based on this record, the defendant never established that he had a witness who was necessary to an adequate defense. He cannot show he suffered any prejudice from the court's ruling because he had no such witness. The court acted within its discretion when it did not grant the defendant's request for an expert funding. See State v. Heffner, 126 Wn. App. 803, 809-10, 110 P.3d 219 (2005)(request for expert properly denied because defendant could not state with any specificity why an expert was needed).

The defendant argues that the expert testimony was "relevant to rebut the State's evidence regarding the robbery aggravator." Brief of Appellant, at 154. However, as stated above, the record contains no indication that the proposed expert had any testimony or information that would have rebutted this evidence. The defendant has failed to meet his burden of showing that the expert's testimony was necessary to his defense.

The defendant's arguments should also be rejected because he has not preserved this issue for appellate review. When the trial court makes only a tentative ruling subject to evidence developed at trial, a party must raise the issue at the appropriate time with proper objections at trial to preserve the issue for appellate review. State v. Jamison, 105 Wn. App. 572, 586, 20 P.3d 1010, review denied, 144 Wn.2d 1018 (2001) (quoting State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)). The defendant raised his request for expert services several months prior to the trial, and he did not re-raise this issue with the trial court at any time afterwards. He made no effort to supplement his request with the information requested by the trial court.

Under RAP 2.5(a)(3), a defendant may allege an error not properly preserved below if it is a manifest error affecting a constitutional right.

See State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1998). A defendant's constitutional right to the assistance of an expert witness is no broader than the defendant's rights under CrR 3.1(f). State v. Hoffman, 116 Wn.2d 51, 90, 804 P.2d 577 (1991). The right to present witnesses involves the right to present material and relevant testimony. See State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The defense bears the burden of proving materiality and relevance, *i.e.* that the defense has a "colorable need" for the witness. Smith, 101 Wn.2d at 41-2. "[T]he right to present evidence in one's own defense is not utterly unfettered. That evidence must be relevant." State v. Ellis, 136 Wn.2d 498, 528, 963 P.2d 843 (1998). A defendant has no constitutional right to present irrelevant evidence. Maupin, 128 Wn.2d at 925. In this case, the defendant failed to show that the proposed expert witness had any testimony that would not have been cumulative of the testimony from Everson or others. The defendant therefore cannot show the trial court's decision prejudiced any constitutional right. The defendant's failure to ask the trial court for a final ruling should preclude appellate review of this issue.

The defendant also argues that the trial court's preliminary ruling denying the expert funding violated his rights to equal protection and due process in that, because of his indigency, he was otherwise denied a basic legal right or was unable to exercise a constitutional right enjoyed by others similarly situated. These arguments should be rejected.

The State may not condition the exercise of a constitutional right upon financial ability or deny a basic legal right because of one's poverty. State v. Melos, 42 Wn. App. 638, 642, 713 P.2d 138 (1986). However, due process of law is not applicable unless one is being deprived of something to which he has a right. Melos, 42 Wn. App. at 642. Moreover, the State is not required to eliminate all disparities between rich and poor in criminal matters but is only prohibited from engaging in invidious discrimination. Riggins v. Rhay, 75 Wn.2d 271, 283-84, 450 P.2d 806 (1969). In this case, the defendant failed to establish that his proposed expert was necessary to his defense. He has therefore not established he was deprived of a necessary witness. Nor can he show discrimination based on indigency. No defendant, rich or poor, has the right to present evidence that is merely cumulative of other evidence. His due process and equal protection claims should be rejected.

11. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING PHOTOGRAPHIC EVIDENCE.

The defendant argues the trial court abused its discretion in admitting certain photographs at trial. Specifically, he alleges the trial court erred in admitting: (1) certain autopsy photographs of victims Scott, Ellis, and Mercer; (2) in-life photographs of the defendant's Spokane victims; and (3) photographs of certain items owned by the victims. The

trial court acted within its discretion in admitting all of these photographs. The defendant's arguments to the contrary should be rejected.

a. The photographs from the autopsy were properly admitted: Exhibits 325, 444, and 604.

Autopsy photographs are admissible if they are accurate and their probative value outweighs their prejudicial effect. State v. Crenshaw, 98 Wn.2d 798, 806, 659 P.2d 488 (1983). A decision to admit photographs is generally within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. Crenshaw, 98 Wn.2d at 806. Although prosecutors and trial courts must use restraint in relying on gruesome photos, "'[a] bloody, brutal crime cannot be explained to a jury in a lily-white manner.'" Crenshaw, 98 Wn.2d at 807 (quoting State v. Adams, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), reversed on other grounds, 403 U.S. 947 (1971)).

Photographs have probative value when "they are used to illustrate or explain the testimony of the pathologist performing the autopsy." State v. Brett, 126 Wn.2d 136, 160, 892 P.2d 29 (1995) (quoting State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), cert. denied, 113 S. Ct. 164 (1992)). Exhibit 325 was an autopsy photograph showing the medical examiner's two incisions in victim Darla Scott's arm. These incisions revealed needle puncture sites underneath the skin. This photograph was relevant toward the common scheme or plan aggravating circumstance.

Many of Yates's victims shared the characteristic of being intravenous drug users. This photograph was evidence that Scott shared this common characteristic with the other victims.

The defendant argues that the evidence was cumulative and overly prejudicial because evidence admitted through Lynn Everson and Michael Mitchell was a "sufficient alternative." The availability of other evidence alone, however, does not support exclusion of photographic evidence. State v. Stackhouse, 90 Wn. App. 344, 358, 957 P.2d 218 (1998). The photograph was not merely cumulative of other testimony. Everson did not testify Scott was an intravenous drug user or that Scott was an addict. Instead, her testimony indicated she knew Scott had an "issue" with street drugs, and that her drug of choice was crack cocaine. RP 4452. Mitchell testified that he knew Scott used street drugs and he stated: "I *think* she was hooked on crack cocaine." RP 4868 (emphasis added). This testimony also did not describe with certainty that she was a drug addict or an intravenous drug user.

In contrast, Exhibit 325 provided direct evidence of repeated intravenous drug use. As the medical examiner testified, the photograph showed "needle puncture sites" into a blood vessel to produce bleeding. RP 4966-67. The photograph was relevant toward establishing that the defendant's common scheme or plan included selecting women with serious drug addiction problems that rendered them more vulnerable once

lured into his vehicle. The trial court acted within its discretion in admitting this photograph.

The defendant also argues the trial court abused its discretion in admitting Exhibit 444, which showed a post-mortem incision in Ellis's leg where the medical examiner was able to extract blood and muscle for DNA analysis. RP 1483. This photograph was relevant for establishing that viable DNA material *could* be extracted from Ellis's remains even though her body was "extensively decomposed and skeletonized" at the time of discovery. RP 1483, 5907. Obtaining a DNA analysis of Ellis's remains was critical to solving her case. DNA analysis ultimately revealed Ellis's blood inside Yates's Ford van, thereby establishing the identity of her killer. The defendant argues that the case involving Ellis was "extremely thin" and he omits reference to this crucial DNA link in his recitation of the evidence. Brief of Appellant, at 172. The trial court acted well within its discretion in admitting this evidence.

The defendant argues that the medical examiner's testimony that he was unable to obtain a blood sample due to the skeletonized nature of the body should have been sufficient without the need for the photograph. This argument misses the point. The medical examiner's ability to obtain tissue for DNA analysis was highly relevant toward proving the identity of the killer. The photograph was probative on this critical issue, and the photograph was properly admitted.

The defendant next challenges admission of Exhibit 604, a photograph taken at Mercer's autopsy showing a plastic bag partially inside her mouth. This photograph was relevant toward the issue of premeditated intent to kill. Yates shot Mercer in the head and then encased her head in four plastic grocery bags. RP 5626. The innermost two bags had a defect or tear around her nose and mouth area. RP 5628. Exhibit 604 shows bags were indented in her mouth, past her lips and partially into her mouth at the time her body was recovered. RP 5386; RP 5628. The defect or tear around her nose and mouth area could have been caused by the bags being sucked into her mouth as she was attempting to breath and by chewing or tearing the bags with her teeth. RP 5628. There was no similar damage found on the two outermost plastic bags that encased Mercer's head. RP 5629. This was circumstantial evidence that one purpose in having the bags in the van was to make sure that a victim died, even if the gunshot wound did not result in immediate death. The trial court acted within its discretion in admitting this photograph.

The medical examiner could not say one way or another whether suffocation was a contributing factor to her death, as there was no test to confirm or rule out suffocation as a factor. RP 5633-34. However, if Mercer had been alive when the bags were placed over her head, it is possible that suffocation contributed to her death. RP 5629.

The defendant appears to argue that the photograph should have been excluded because the State did not discuss it at the pretrial hearing

concerning the admissibility of photographs. However, the photograph had been provided the defense 1½ years prior to trial. RP 5450. The prosecutor had not realized the significance of the photograph until one of the detectives had testified at trial. RP 5450. The prosecutor raised this issue before the trial court outside the presence of the jury prior to making the photograph the subject of the medical examiner's testimony. RP 5450.

In response, the defendant did not request exclusion of the photograph based on any "discovery" violation. Instead, the defendant requested additional time to consult with his own pathologist, whom he already had on a retainer, and to interview the medical examiner prior to any further discussion of the photograph. RP 5453, 5456. The court granted the defendant's request for additional time. Several days later, the defendant's attorney informed the court: "[W]e had the opportunity to interview [the medical examiner] and discuss it with our pathologist, and I am prepared to go forward." RP 5625. The defendant cannot now claim prejudice since he acknowledged before the trial court that his requested remedy of additional time had been granted, and he did in fact consult with his expert and the medical examiner prior to any further testimony regarding the photograph. His argument that he suffered prejudice should be rejected.

b. The in-life photographs of Spokane County victims were properly admitted.

The defendant argues the trial court erred in admitting in photographs of the Spokane victims as they appeared in life. Exhibit 281 (Zielinski), 292 (Joseph), 308 (Hernandez), 316 (Scott), 326 (Johnson), 340 (Wason), 354 (Oster), 368 (Maybin), 405 (Murphin), and 422 (Derning). As a preliminary matter, the defendant did not preserve an objection to admission of the majority of these photographs.

On April 18, 2002, the court heard argument on their admissibility at a pretrial hearing. RP 1002-06. At the conclusion of the hearing, the court reserved final ruling until it had a chance to review the photographs as they related to the common scheme or plan issue, and until the parties had further opportunity to brief the issue. RP 1006. It appears from the record that no further argument or briefing was presented on this issue. At trial, all but two of the photographs were offered and admitted without objection from the defense. RP 4428 (Exhibit 281, Zielinski); RP 4435 (Exhibit 292, Joseph); RP 4438 (Exhibit 308, Hernandez); RP 4450 (Exhibit 316, Darla Scott); RP 4453 (Exhibit 326, Shawn Johnson); RP 4456 (Exhibit 340, Lori Wason); RP 4459 (Exhibit 368, Linda Maybin); RP 4463 (Exhibit 405, Melody Murphin). The defendant has not preserve any issue with regard to admission of these photographs.

The defense arguably did preserve an objection to admission of in-life photographs of Oster and Derning. RP 5163 (Oster), 5721 (Durning).

The trial court acted within its discretion in admitting these in-life photographs.

The admission of photographs of murder victims as they appeared in life lies within the trial court's discretion. State v. Finch, 137 Wn.2d 792, 811, 975 P.2d 967 (1999). Such photographs have been held relevant to establish the identity of the victim. State v. Rice, 110 Wn.2d 577, 598-99, 757 P.2d 889 (1988). The State need not accept a stipulation as to identity and may insist on proving the issue in the manner it wishes. Rice, 110 Wn.2d at 599. In-life photographs are not inherently prejudicial, particularly when the jury has seen the after-death photographs of the victim's body. State v. Furman, 122 Wn.2d 440, 452, 858 P.2d 1092 (1993).

Moreover, these photographs were relevant to show that the Pierce County murders were part of a common scheme or plan with the Spokane murders in that Yates sought out his murder victims by the physical characteristics of skin tone, hair color and approximate age. The photographs reveal that Oster and Derning, as well as the other victims, appeared to be light-skinned women who were brunettes of a certain age. Exhibit 281, 292, 308, 316, 326, 340, 354, 368, 405, 422. In addition, the in-life photographs also assisted the jury in processing what would otherwise appear to be repetitive testimony by attaching a face to the discovery and autopsy of each of the many bodies. The trial court acted within its discretion in admitting these photographs.

c. The photographs of the victims' possessions were properly admitted.

i. Shawn Johnson's car.

The defendant argues the trial court erred in admitting Exhibit 339, a photograph of victim Shawn Johnson's car. The court acted within its discretion in admitting this photograph.

Relevant evidence is evidence that has a tendency to make the existence of any fact that is of consequence more probable than it would be without the evidence. RP 401. The photograph depicted Shawn Johnson's car after it was recovered from the East Sprague corridor. RP 5039. It had been found at the eastern boundary of the area where prostitutes worked most frequently in Spokane. RP 5030. This photograph assisted in connecting Johnson's disappearance to her prostitution activity, which in turn was relevant for the common scheme or plan aggravating factor. The defendant's common scheme or plan involved selecting victims among the women actively working as prostitutes. The photograph was relevant and properly admitted.

The defendant argues that the photograph was not relevant because the photograph was not taken where the car was discovered at the East Sprague Corridor, but at the police vehicle processing station. RP 5039. The car nevertheless was relevant to connect Johnson's disappearance to her prostitution activity. Johnson lived about five miles from the East

Sprague Street Corridor. RP 4982. The night she disappeared she informed her roommate that she was going out to make money through prostitution RP 4984. She was not seen alive again. RP 4985. The photograph established that she did *in fact* have a car, and therefore had a ready means to arrive at her destination. The trial court acted within its discretion in admitting this photograph.

ii. Christine Smith's jacket.

Finally, the defendant argues the trial court erred in admitting photographs of a Mickey Mouse jacket found in the defendant's residence that belonged to Christine Smith. Exhibits 509, 510, 511, RP 1502. These photographs showed the jacket hanging in the closet as it was found in Yates's home (RP 6298, Exhibit 508), the jacket in the closet with the other clothes removed (RP 6298, Exhibit 509), and the back and front of the jacket respectively. RP 6298, Exhibit 510 and 511.

The photographs of Christine Smith's jacket showed that Yates retained possession of a victim's article of clothing after he had shot her. The defendant apparently kept Smith's coat in his closet at home from 1998, the time he shot Smith, to the time his home was searched in April 2000. RP 1502. This is relevant toward showing the defendant's common scheme or plan of retaining possessions, such as money, from his victims, as none was found with any cash on or near her person.

The defendant argues that the photographs of Smith's coat were irrelevant because Yates did not rob Smith, she merely fled his vehicle after being shot in the head and neglected to take her coat with her. Whether or not this particular incident can be characterized as robbery is not the point. The incident revealed that Yates viewed objects belonging to the victims as available for appropriation once he killed them. The trial court properly admitted this evidence as evidence of the defendant's common scheme or plan of murdering women and retaining their possessions.

Even if the defendant could establish that the trial court somehow abused its discretion in admitting any of these photographs, the defendant cannot established that he suffered prejudice necessary for reversal. The court will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004)(citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). As stated above, the evidence of Yates's guilt in murdering Ellis and Mercer was overwhelming, as was the evidence of each of the aggravating factors. The defendant cannot establish that admission of any of the photographs was either error or prejudicial.

12. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING USE OF THE SUMMARY CHART--EXHIBIT 544.

The defendant argues the trial court erred in allowing the State to use as a demonstrative exhibit a large chart summarizing the evidence admitted for each of the Pierce County and Spokane victims. Exhibit 544. The trial court acted well within its discretion in allowing use of this exhibit.

The admissibility of demonstrative evidence is well within the trial court's discretion. State v. Stockmyer, 83 Wn. App. 77, 83, 920 P.2d 1201 (1996). The use of demonstrative evidence is favored, and the trial court is given wide latitude in determining whether or not to admit demonstrative evidence. State v. Lord, 117 Wn.2d 829, 855, 822 P.2d 177 (1991) (citing State v. Chapman, 84 Wn.2d 373, 378, 526 P.2d 64 (1974)). A summary chart "can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." Lord, 117 Wn.2d at 855 (citation omitted).

The State's case was voluminous, complex, and fragmentally revealed over the course of testimony that spanned four weeks. During the State's case, 60 witnesses testified and over 600 exhibits were admitted. Evidence was admitted regarding each of the 12 murder victims, how and where their bodies were discovered, the condition in

which they were found, and the information gathered at each autopsy. Testimony was also heard from Christine Smith, the victim who survived the gunshot to the head. Other witnesses testified about the police investigation, analysis of recovered bullets, DNA analysis, and other factors that linked the individual victims to the defendant.

Exhibit 544 assisted the jury in evaluating and organizing this voluminous evidence. The chart was approximately 7 ½ feet by 13 feet. It had 15 categories listed vertically on the left side: (1) the date the victim was last seen, and the date the body was recovered (2) the victim's gender, (3) whether the victim had a history of prostitution and/or drugs, (4) the cause of death, (5) the bullet(s)/gun type, (6) whether Yates owned this type of weapon, (7) Yates's method of contacting the victim, (8) whether plastic bags were found, (9) whether money was present or absent at the scene, (10) whether semen was found in the body, (11) whether the victim was transported, (12) whether the victim's body was immediately found, (13) whether the victim's clothing was removed/missing, (14) whether the victim's blood was found on Yates's property, (15) whether Yates pleaded guilty to the victim's premeditated murder. Exhibit 544.

The chart had the names of each of the 13 victims listed horizontally across the top. RP 4734. Information specific to each victim on each of the 16 categories appeared in a vertical row underneath the victim's name. This vertical column underneath each of the victims' names was intended as a summary of the testimony and evidence that had

been admitted at trial with respect to that particular victim. RP 4734. The chart was built during the course of the State's case. RP 4733. Information pertaining to each victim was posted or revealed only after evidence of the information had been admitted. The court allowed the defense the opportunity to contest the accuracy of the information prior to revealing the information to the jury.

Lord indicates that two requirements should be met with regard to the use of summary charts at trial. First, the court "must make certain that the summary is based upon, and fairly represents, competent evidence already before the jury." Lord, 117 Wn.2d at 855. The court fulfills this duty, in part, by allowing the defense full opportunity to object to any portion of the summary chart before it is seen by the jury. Lord, 117 Wn.2d at 856. The court in Lord explained:

> This does not mean, however, that there can be no controversy as to the evidence presented. *Rather, the chart must be a substantially accurate summary of the evidence properly admitted.* The jury is then free to judge the worth and weight of the evidence summarized in the chart.

Lord, 117 Wn.2d at 855-56 (emphasis added).

Second, the jury must be instructed that the chart is not itself evidence, but only an aid in evaluating the evidence. Lord, 117 Wn.2d at 856. The chart itself should not go to the jury room, but instead be used only during the initial presentation of testimony and/or in final argument by counsel. Lord, 117 Wn.2d at 857.

Exhibit 544 met the requirements of Lord. First, the information contained on the chart was accurate and individual portions of the chart were not revealed to the jury until the information had been admitted in court. The defense counsel had a full opportunity to raise challenges to the information prior to showing it to the jury. See e.g. RP 4355-57, 4712-24. In addition, the chart was displayed during the presentation of the State's case and during closing argument, but it was not visible during opening statement and presentation of the defendant's case. RP 4721; 6977-78.

Second, the jury was instructed that the chart itself was not evidence. RP 4735. The chart did not go to the jury room during deliberations. RP 7591[21]. The trial court acted within its discretion in allowing use of the chart.

The defendant argues that the trial court erred in allowing use of the chart because he alleges the chart was inaccurate and misleading in three respects. First, the defendant argues the chart was misleading for listing victim Christine Smith because the chart contained a section labeled "Cause of Death" and Yates had only *tried* to murder Smith. RP 4356, 4716. Under Smith's column, the notation for "Cause of Death"

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[21] Prior to excusing the jury to begin its deliberations, the trial court stated, "There were, as I mentioned to you earlier, some charts that were used for illustrative or demonstrative purposes during the course of the trial. *Those are not exhibits for your review.*" RP 7591 (emphasis added).

read: "Gunshot wound to head (survived)." Exhibit 544. The notation "(survived)" was sufficient to accurately reflect the evidence presented at trial. In addition, the chart listed the notation "survived attempt on life" several other times on categories including "clothing removed/missing", "victim not immediately found," and "plastic bags." Exhibit 544. Under the category regarding whether Yates's pleaded guilty to premeditated murder, the chart reflected "Yes (Attempted Murder)." The chart made it clear that Smith had survived the attack.

Moreover, Christine Smith testified to the jury in graphic and memorable detail regarding her 1998 encounter with Yates during which he lured her into his van, negotiated an arrangement for oral sex, and then shot her in the head as she was performing the act. RP 4484-4534. It is unlikely that the jury would have been mislead by the notations "Cause of Death" and "Gunshot wound to the head (survived)" into concluding that Smith did in fact die as a result of her encounter with Yates. Moreover, no one argued at trial that Smith had died, so there was no way the jury could have been confused or misled. The chart was sufficiently accurate with respect to Smith.

The defendant next argues the chart was misleading because it contained a "yes" notation indicating that Shannon Zielinski's clothing was "Removed/Missing" at the time her body was recovered. The defendant argues that the "yes" was inaccurate because the chart implies that Zielinski's panties were missing from the body, but her pantyhose,

which the defendant speculates she may have worn in lieu of panties, were found near her body. The chart's "yes" accurately reflected the evidence produced at trial. Articles of clothing were obviously "removed" and/or "missing" from Zielinski's body at the time it was recovered. Zielinski's body was found clothed in a short one-piece dress that was pulled up to her upper torso area. RP 4558. No other clothing was found on her body. It is obvious that clothing had been "removed" since her socks, pantyhose, and a boot were found a short distance away. RP 4559. It is also obvious that at least one article of clothing was "missing" since only one boot was present on the scene. RP 4559. No other article of clothing, personal possession, or money was found in the area. RP 4559. The chart's "yes" notation for "Clothing Removed/Missing" accurately reflected the evidence produced in court with regard to Zielinski, despite the defendant's argument concerning her panties.

Finally, the defendant argues the chart's section labeled "Clothing Removed/Missing" was also misleading with respect to victim Mercer. As with Zielinski, the chart's notation "yes" with regard to Mercer accurately reflected the evidence presented in court.

The record supports the conclusion that clothing was "removed" from Mercer's body. Her body had been dumped *nude* in some blackberry bushes. RP 5372-73. Therefore *all* of her clothing had been removed.

The record also supports the conclusion that items of clothing were "missing." She was last seen alive on December 6, 1997, between 8:30

and 9:30 p.m. RP 5324. At the time, she was seen wearing a black tank top, a long floral skirt, a light blue powder blazer jacket, a black coat, and she had a purse and shoes. RP 5344-45. She was also wearing a brassiere, the straps of which showed under the tank top. RP 5344-45. When her body was discovered, some of her clothing had been found thrown on top or nearby her body. RP 5372, 5382. But a number of items were not present and were therefore "missing," including her brassiere, tank top, purse and shoes. Exhibit 544's notation "yes" under "Clothing/Removed Missing" accurately reflected the evidence presented in court. The defendant has failed to establish that the summary chart was either inaccurate or misleading with respect to Mercer or any of the other victims.

The trial court made every reasonable effort to ensure that the charts were substantially accurate. Specifically, the trial court allowed modification of the charts upon objections by the defense, took care to ensure the defense had a full opportunity to make objections to the information before the information was shown to the jury, and it properly instructed the jury that the chart itself was not evidence. The trial court acted within its discretion in allowing the State to use the chart during presentation of its case and during closing argument. The defendant's arguments to the contrary should be rejected.

In the event that the court somehow finds that use of the chart was error, the defendant raises various arguments that use of the chart was not

harmless error. The court will not reverse a conviction based on an error in admitting evidence that did not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004)(citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). The defendant cannot show prejudice with regard to the chart.

The defendant first argues that the chart "allowed the jury to rely on the facts on the charts if they were proven and provided an extra summation for the State." Along the same line of argument, the defendant also asserts that the chart played a critical part in the State's presentation of the evidence and "stayed in front of the jury, confronting them during the entire trial. . . ." The defendant's argument should be rejected due to the court's limiting instruction on the use of the chart. A jury is presumed to have followed the court's instruction. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 5 (1982). The jury therefore is presumed to have only considered the chart for permissible purposes. The court authorized revealing information on the chart only when the information was admitted at trial, and the court authorized removal of the chart when the State's case-in-chief was completed.

The defendant also appears to argue that the chart allowed the jury to improperly convict the defendant of Ms. Ellis's death because the evidence of Yates's guilt with respect to her death was "extremely thin." As stated above, the case regarding Ellis was strong. DNA analysis linked a bloodstain in Yates's van to Ellis. Yates had used the same gun to kill

Ellis as he had to kill Murfin and to wound Smith. Documents found in Yates's residence established that Yates was in the Tacoma area during the time period Ellis was last seen alive. Yates used his unique signature in Ellis's murder by encasing her head in plastic grocery bags after shooting her in the head. Contrary to the defendant's assertion, the evidence of Yates's guilt with respect to Ellis was *overwhelming* instead of "thin."

The trial court acted within its discretion in allowing use of the chart. The defendant's arguments to the contrary should be rejected.

13. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT THE PROSECUTOR ENGAGED IN MISCONDUCT OR THAT IT PREJUDICED HIS TRIAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). Prejudice is established only if there is substantial likelihood the instances of misconduct affected the jury's verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or

request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

While the United States Supreme Court has reversed a conviction for prosecutorial misconduct where it was shown that a prosecutor obtained a conviction with false evidence by knowingly and repeatedly misrepresenting that stains on a piece of evidence were blood when they

were paint. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). It has also granted a new trial where the prosecutors improper actions continued throughout the entire trial because "where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." Berger v. United States, 295 U.S. 78, 89, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). But it has also warned against finding reversible misconduct based upon the wording of closing arguments:

> The "consistent and repeated misrepresentation" of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Defendant assert that the prosecutor engaged in misconduct during the guilt phase and the penalty phase. This claim will be addressed in the corresponding sections below.

a. Defendant's claims of prosecutorial misconduct in the guilt phase are either without merit or did not result in any enduring prejudice to defendant.

Defendant contends that prosecutorial misconduct occurred twice during the presentation of evidence, as well as during closing arguments in the guilt phase.

Defendant asserts that the prosecutor committed misconduct by adducing evidence that the defendant owned guns and was interested in target shooting. RP 5882-5885, 5889-5893. In making this argument, defendant acknowledges that the court did not grant his motion in limine to exclude such evidence and later allowed such evidence before the jury. Appellant's brief at pp. 184-185. Yet defendant does not assign error to the evidentiary rulings, only to the prosecutor's actions in adducing this evidence. See Appellant's Brief at pp 2-8 (assignment of error no. 33). Defendant presents no authority that it is misconduct for a prosecutor to try to adduce relevant evidence in the absence of some prior court ruling disallowing it. If defendant thought this evidence was improperly admitted, he should have challenged the evidentiary rulings directly as it does not provide a basis for claiming prosecutorial misconduct. To the extent the court interprets his claim as alleging a prosecutor commits misconduct by drawing adverse inferences from evidence showing the exercise of a constitutional right, the State offers the following argument to show this claim is painted with too broad a brush.

Defendant relies upon State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984). In Rupe, the prosecution admitted evidence of Rupe's weapons collection then argued that it shows his violent proclivities and suggested it was an aggravating factor warranting a death sentence. The Washington Supreme Court held that this was improper as it asked the jury to punish him for engaging in a constitutionally protected activity. However, the Supreme Court later clarified the limits of this holding in State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988). The court described its holding in Rupe as precluding use of ownership of a gun to draw adverse inferences regarding the defendant's *character*. It went on to say:

> At the same time, however, we do not have a per se rule barring the admission of evidence of a defendant's ownership of firearms. The essential inquiry is one of relevance. Where a defendant's ownership of a gun is relevant to an issue at stake in the trial, we recognize no special rule that would prevent that evidence from being admitted. The problem in Rupe was that the prosecutor sought to admit evidence of the defendant's gun collection in the sentencing proceeding for the sole purpose of portraying the defendant as an extremely dangerous individual. The evidence of gun ownership was irrelevant to the issues at stake in that case and, given the context in which it was presented, was highly prejudicial.

State v. Hancock, 109 Wn.2d at 767-768. The court found that evidence of gun ownership was relevant to the issues in Hancock's case and affirmed the trial court's admission of the evidence.

The United States Supreme Court is in accord that evidence of the defendant's exercise of a constitutional right may have relevance in a

criminal case. In Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), the United States Supreme Court addressed whether the First Amendment prohibits the evidentiary use of speech. The Mitchell court was reviewing a decision of the Wisconsin Supreme Court invalidating a statute that increased the punishment for an aggravated battery when the defendant selected his victim on the basis of the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry. One of the reasons the Wisconsin Supreme Court had found the statute unconstitutional was that, in order to prove a defendant intentionally selected his victim because of race, the prosecution would have to introduce evidence of the defendant's prior speech; the Wisconsin court opined that this evidentiary use of protected speech was unconstitutional. 508 U.S. at 482.

The United States Supreme Court disagreed. It held "[t]he First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." 508 U.S. at 489; see also Haupt v. United States, 330 U.S. 631, 67 S. Ct. 847, 91 L. Ed. 1145 (1947)(admission of statements showing sympathy with Germany and Hitler and hostility toward the United States properly admitted to show intent and motive of man charged with treason); United States v. Salameh, 152 F.3d 88, 111-112 (2d Cir. 1998), cert. denied sub nom., Abouhalima v. United States, 525 U.S. 1112, 119 S. Ct. 885, 142 L. Ed. 2d 785 (1999); United States v. Allen, 341 F.3d 870, 886 n.23 (9th Cir. 2003).

Thus, the holdings in Rupe, Hancock, and Mitchell are in accord. Under Hancock and Mitchell, evidence of gun ownership could have been admitted to prove familiarity with or access to a weapon of the type used to commit the substantive crime. Under Rupe, evidence of gun ownership will be excluded if used to prove the defendant's dangerousness or propensity.

In this case the court found the evidence was relevant and admissible – a ruling that has not been challenged on appeal. Consequently, the prosecutor did not commit misconduct by adducing relevant and admissible evidence.

Defendant also contends that one of the prosecutor's questions on cross-examination of a defense witness was aimed at appealing to the jury's passions and prejudice. The witness was a woman, working in prostitution, who had had several "dates" with the defendant:

> Prosecutor: And your gut feeling was that that man over there, Robert Yates, was a good guy to go with?
>
> Witness: Yeah,
>
> Prosecutor: And you went with him?
>
> Witness: Yes, ma'am, I did.
>
> Prosecutor: You are lucky to be alive, aren't you?
>
> Defense Counsel: Objection; move to strike. That's argumentative.

> Court: That question and response will be stricken from the record, counsel.

RP 7093. Defendant asked for a mistrial; the court took the motion under advisement. RP 7094-7096. The court, after reviewing several cases on prosecutorial misconduct, denied the motion for mistrial, finding that its prompt action cured any prejudice and that the defendant's right to a fair trial had not been unduly or unfairly prejudiced. RP 7298-7304.

Firstly, defendant has failed to explain how he was prejudiced by the argumentative question. This is especially true in a case where the defense acknowledged, in opening statements, that the defendant killed both victims, Melinda Mercer and Connie LaFontaine Ellis, and that he had killed several more women in Spokane. RP 4366-4367. The contested issue in this case was not whether defendant had committed the murder, but whether aggravating circumstances existed. Defendant fails to explain how this statement would inflame the jury into finding an aggravating circumstance.

Moreover, defendant has failed to explain how the court's remedial action was insufficient to cure any prejudice caused. The jury was expressly instructed to disregard evidence that was stricken by the court and to not allow prejudice to influence their verdict. RP 7428; CP 4086. A jury is presumed to follow the court's instructions. Zafiro v. United States, 506 U.S. 534, 540-41, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) ("[E]ven if there were some risk of prejudice, here it is of the type that can

be cured with proper instructions, 'and juries are presumed to follow their instructions.'")(quoting Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)). Defendant has failed to show that there was any enduring prejudice from this remark, so as to justify the grant of a new trial on the guilt phase.

Next, defendant contends that the prosecutor engaged in improper argument in the guilt phase. Defendant argues that the prosecutor committed misconduct by arguing an incorrect statement of the law when making the following argument regarding Instruction No 15[22], the instruction which defined the crime of robbery:

> Prosecutor: And it can be done with –even though it's without their knowledge, provided the force prevented them from knowing it.
>
> One way to do that is if a person goes into a market and pulls what appears to be a gun on the clerk[,] scares the dickens out of them, and they run away and then the robber helps themselves to the till, well that's still robbery, even though the person who ran didn't know that they actually took the money. It's still robbery.

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[22] Instruction 15 read: "A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property, not belonging to the defendant, from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear." CP 4101.

> So, too you can rob someone you just murdered. You prevented their knowledge of it by killing them, and it's still robbery.
>
> Please don't be troubled by the fact that the money that he gave them was for an illegal purpose...
>
> Defense Counsel: Your Honor, I'd object to the last statement that you can – robbery is just taking from the dead. That's not the law. The law is in the instruction that requires intent.
>
> Court: I have instructed the jury on the law. I am going to overrule your objection. This is argument.

RP 7576-7577. On appeal, defendant maintains his contention that the prosecutor's argument was legally erroneous, but provides no supporting authority for this assertion.

The prosecutor's argument was a correct statement of the law. This court has long held that if a robbery and a murder are part of the same transaction the fact that the homicide occurs before the robbery is consummated does not change the character of the latter offense –it remains a robbery. State v. Craig, 82 Wn.2d 777, 782-783, 514 P.2d 151 (1973); State v. Coe, 34 Wn.2d 336, 341, 208 P.2d 863 (1949). Defendant has failed to show misconduct with respect to this argument.

Defendant also contends that the prosecutor disparaged defense counsel in the final remarks of his rebuttal argument in the guilt phase:

> Prosecutor: The lawyers have had their say, and now you'll have your say. We thank you for your patience during this lengthy trial. On behalf of all of the decent and

> law abiding citizens of the state whom we are honored to represent –
>
> Defense Counsel: Objection, Your Honor.
>
> Court: Well, go ahead,... Finish.
>
> Prosecutor: We are honored to represent the citizens of this state, and on their behalf, we thank you for your service. And on our behalf, we now ask you please return verdicts of guilty as charged. Thank you.

RP 7587-7588. Defendant immediately moved for a mistrial or a curative instruction arguing that the comments suggested that the prosecutor was the arbiter of community standards and that it was implying that defense counsels client was less worthy. RP 7592 -7596. The court ruled that it did not see "any inference about the defense attorneys or the defendant" and that it did not find it to be "an egregious comment which would necessitate a mistrial or a curative instruction." RP 7597.

As a general rule, a prosecutor should refrain from attacking the integrity and ethical standards of defense counsel. United States v. Young, 470 U.S. 1, 9, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (it is improper for an attorney to make "unfounded and inflammatory attacks on the opposing advocate."). However, this prohibition is limited to where the record is void of any specific evidence to support the claim. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920, 105 S. Ct. 302, 83 L. Ed. 2d 236 (1984). Such attacks are not improper if supported by the record. United States v. Pungitore, 910 F.2d 1084, 1142

(3d Cir., 1990); United States v. Patterson, 23 F.3d 1239, 1248 (7th Cir., 1994); State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994).

Defendant relies upon State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), review denied, 148 Wn.2d 101, 262 P.3d 890 (2003), to support his claim of prosecutorial misconduct with regard to the challenged argument. In Gonzales, the court found the prosecutor's argument suggesting that the defense attorney might not be a trustworthy advocate because prosecutors have an obligation to see that justice is served, whereas defense attorneys only have an obligation to their clients to be misconduct. Gonzales, 111 Wn. App. at 283. While the court found this type of argument to be misconduct, it did not hold -contrary to defendant's suggestion - that such misconduct constituted reversible error. The court had already reversed Gonzales's conviction on another ground; its discussion of misconduct was dictum. Defendant does not provide authority that reversal is warranted based upon a single improper comment. Nor has defendant shown improper argument.

Gonzales is distinguishable. The argument in that case directly contrasted the role of the prosecutor and defense counsel stating "[Defense counsel] has a client to represent, I don't. Justice, that's my responsibility...." This directly suggests that defense counsel is not concerned with justice. In the case before the court, the prosecutor said nothing about defense counsel or the defendant; he simply thanked the jury for their service, as defense counsel had done. RP 7567. This

comment did not denigrate opposing counsel or their function in the justice system. Defendant has failed to show this constitutes misconduct.

Defendant has failed to show that the prosecution committed any misconduct, much less prejudicial misconduct, in the guilt phase.

b. The prosecutor did not engage in improper argument in the penalty phase.

Defendant alleges that the prosecutor improperly commented on his right to counsel and his right to remain silent in the following argument:

> Prosecutor: His religious conversion, we ask you to consider how this can be useful to you in deciding what punishment is appropriate.
>
> Now, his claimed conversion occurred after his arrest. The crimes had been committed, of course, long before then. It's notable, we feel, that he did not turn his life to God before his arrest and turned [sic] himself in to authorities.
>
> You'll recall that the last murder was in late 1998, so all of that goes by, all of '99 goes by and, we are into April of 2000. Had he seen the remorse, felt the remorse, seen the need to confess, he certainly could have turned himself in, and such a scenario would have been a lot more credible.
>
> Please recall that only a short time before his arrest he was telling fellow pilots that the serial killer was too smart to get caught; there was not enough evidence.
>
> When did his remorse arrive? Did it really show up? Did it really show up after his arrest, as he asserts?
>
> Let me point out a few things to you. What about the location of Melody Murphin whose body was not revealed,

> as the evidence showed you, until the eve of his guilty plea in Spokane.
>
> Now, you've heard from the defendant's, one of his pastors that he might have revealed this information to his lawyers. The defendant said as much to you. That did not absolve him of the despicable decision –
>
> Defense Counsel: I object, Your Honor. He is commenting on his right to counsel.
>
> Court: Overruled.
>
> Prosecutor: The defendant's despicable decision to hold onto that information until such time as it might work to his advantage. You have to picture this. The serial killer was caught finally in Spokane in April of 2000. The defendant was finally facing trial for a string of murders, yet Melody Murphin's family remained in anguish for six long months. Her location was not revealed until October of 2000, six months after his arrest. Is that remorse on his part? Can he pass that off to his lawyers? No, he cannot.

RP 8222-8224. This court should note that there is no challenge to this argument on the grounds that it was unsupported by evidence. Examined in context, it is clear that the argument was not improper. The State was addressing how mush credence the jury should give to defendant's mitigation evidence that he was remorseful for his acts. This is a proper subject matter for argument. The clear thrust of the prosecutor's argument is that, by examining defendant's actions, there was no indication of any remorse until he was caught, therefore, his claims of remorse should be treated with skepticism. The prosecutor pointed out that, even after his arrest, defendant made choices that were self-interested rather than

focused on making amends for his past acts; he argued that defendant is accountable for the decisions he made. This argument does not constitute misconduct.

Defendant argues that this was an improper comment on the right to counsel. Generally, an improper comment on the right to counsel is one that asks the jury to infer guilt from the fact that defendant asks for or has an attorney. Not only does the challenged argument fail to make that inference, at the time the argument was made, defendant's guilt had already been determined. Here the issue before the jury was whether defendant should be sentenced to death or life without the possibility of parole. In this context, defendant must show that the State was inferring that the jury should impose a death sentence because defendant was represented by counsel. Defendant does not explain how the challenged argument is one which suggests that the jury should return a verdict of death because the defendant was represented by counsel; nor is it likely that a jury would construe the challenged argument in such a manner. Defendant has failed to show that this argument was improper.

Defendant next asserts that the prosecutor commented on his right to remain silent. A comment on a defendant's right to remain silent occurs when the State uses the defendant's exercise of his Fifth Amendment rights as either substantive evidence of guilt or to suggest that the silence was an admission of guilt. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Not every reference to silence constitutes a "comment on

silence." Id., 130 Wn.2d 706-707; State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999). A prosecutor violates a defendant's Fifth Amendment rights if the prosecutor makes a statement "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987) (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), review denied, 91 Wn.2d 1013 (1979)). In State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001), this court held that "[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he does not say." 143 Wn.2d at 765.

Defendant alleges error occurred in the following argument:

> Prosecutor: With respect to his religious conversion, ladies and gentlemen, you might have heard it said that there are not atheists in fox holes. It might be fair to describe his conversion as fox hole Christianity arriving when the shells are raining down upon him.
>
> Again, when was his remorse? What about the details, the details of what he has done? He has never revealed them. He has talked with many people, pastors, police before his arrest.
>
> Defense Counsel: Your Honor, I object. He's commenting on his right to remain silent.
>
> Court: Overruled.
>
> Prosecutor: I am talking about the evidence before you. He talked with police before his arrest. He talked with pastors. He has written many, many letters. He addressed the Spokane County Court when he entered his plea. Isn't confession supposed to be good for the soul? Ladies and

> gentlemen, it's the State of Washington that carefully laid out for you what he did. He has never done so. When he stood before you this morning, did he ever offer a single detail?
>
> Defense Counsel: Again, Your Honor, I object. That's in direct violation of this Court's—
>
> Court: Overruled.
>
> Prosecutor: Now, [defense counsel] told you in opening statement of guilt phase of this trial that the defendant was waiting two years for his lawyer to tell you what he – that he did it. That he did what? When has the defendant, according to the evidence that you've heard in this case, when has the defendant ever tell – did he ever tell his new-found friends after his arrest what he did? If he is remorseful, ladies and gentleman, would he not offer up details of what he did?
>
> Defense Counsel: I object again, Your Honor.
>
> Court: Overruled.
>
> Prosecutor: If he is remorseful, ladies and gentleman, where are the guns that he used to kill his victims? If he is remorseful, how come he has never explained to the various people that you've heard testimony from why he did it? He promised his own father that his dad would learn some day. This is not remorse. We submit to you that it is an attempted manipulation on [sic] the justice system in view of the jury. It is another part of his façade.

RP 8224-8226. After the prosecutor initial closing argument, defendant moved for mistrial on the grounds of prosecutorial misconduct. RP 8244-8245. With regard to the objections set forth above, the prosecutor argued that he was allowed to address what was missing from the statements defendant did give to others as long as he did not reference the fact that on

other occasions the defendant remained silent. He indicated that he had tried to word his arguments carefully. RP 8249-8250. The court ruled that the prosecutor's arguments did not exceed the bounds of proper argument and noted that the jury had been instructed that the fact that the defendant did not testify cannot be used to infer a lack of sufficient mitigating circumstances. RP 8251-8252, see also RP 8207.

Looking at the argument in context, it is clear that the prosecutor was not calling attention to the times when defendant exercised his right to remain silent. Rather, the prosecutor was directing the jury to examine the defendant's allocution and the evidence of defendant's prior statements, or in other words – examine when he did not remain silent, and to assess the content of those statements. Under Clark, the prosecutor may in such circumstances "comment on what [defendant] does not say." 143 Wn.2d at 765. Moreover, the thrust of the argument was asking the jury to assess the credibility of defendant's mitigation evidence regarding his post-arrest return to Christianity and his claims of remorse to see whether they were deserving of any weight. This is a proper subject for argument in the penalty phase.

Defendant cites to Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) and Lesko v. Lehman, 925 F.2d 1527, 1541-1542 (3rd. Cir.), cert. denied, 502 U.S. 898 (1991), for support of his claim that this argument constitutes misconduct. Griffin established a prohibition about commenting on a defendant's failure to testify in the

guilt phase. There is disagreement in the federal courts as to whether Griffin is applicable to the penalty phase after a defendant has testified regarding sentencing. The Lesko case, relied upon by defendant, is on one side of this split of authority. On the other side is Tucker v. Francis, 723 F.2d 1504, 1511-12 (11th Cir. 1984), which holds it is "not fundamentally unfair to comment on the appellant's silence during the culpability phase as juxtaposed with his exculpatory testimony during the sentencing phase."

The Washington Supreme Court cited to Tucker with approval when faced with a situation very similar to the one presented here. In State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722 (1986), the court addressed a claim that the prosecutor's argument regarding the content of the defendant's allocution constituted an improper comment on his right to remain silent. The court held that as the prosecutor's comment occurred during the sentencing phase after the defendant spoke to the jury by way of allocution that "the prosecutor's comment was permissible, and did not violate defendant's Fifth Amendment privilege." State v. Jeffries, 105 Wn.2d at 416. Under Clark, Tucker, and Jeffries, defendant has failed to demonstrate that any misconduct occurred.

Defendant contends that the following argument improperly denigrated defense counsel:

> Prosecutor: Another topic that has been raised and will be argued about is mercy standing alone. Is that a sufficient reason for leniency?

Members of the jury, this is an unspoken. One of the arguments, the issues that have been presented to you is an unspoken reason the defense wants [you to] believe that Mr. Yates is a Christian person. It's unspoken. The defense is trying – the defense is trying to pander to those among you who are Christians.

Defense Counsel: I object, Your Honor. He's attacking counsel.

Court: This is argument. Overruled.

Prosecutor: Members of the jury, you have to understand that the defense is subtly trying to make you feel guilty about doing your duty as jurors if it results in a death sentence. They want [you to] think that the Almighty has forgiven the defendant and that any decent Christian person ought to likewise forgive him and show mercy.

It is – it's playing the religion card. It is the moral equivalent of playing a race card. The defense is trying to reach out to Christian brothers. We submit to you that Christianity as a theology involves accountability, too. So even if you were to believe somehow that Christian doctrine forbids the death penalty, although there is no evidence of that before you, still, I urge you to keep in mind that you are officers of the court, and each of you have sworn an oath to follow the law, even if it were to conflict with your personal beliefs.

Ladies and gentlemen, every one of you, every single one of you told us in jury selection that if the State proves what it must, you could return a death verdict, and we suggest that it is shameful, frankly, that the defense would attempt to play upon spiritual beliefs.

Defense Counsel: I object again, Your Honor.

Court: This is argument. Overruled.

RP 8230-8231. The trial court later elucidated its reasons for overruling these objections.

> Court: I did not hear anything in [the prosecutor's] argument that suggested unethical conduct by the defense attorneys. What I believe I heard was a comment that some of the arguments or positions advanced were inappropriate. "Shameful" was a term used at one time.
> ....
>
> And pander. Those I don't find to be personal attacks regarding the ethics or integrity of defense counsel. You, know it may be pushing the line somewhat, but I think the defense likewise has the ability to make similar comments should they choose to do so. I don't think it was an attack on the ethics of the attorneys and the manner in which they have advanced certain positions.

RP 8248-8249. The court, who heard these arguments and the tone in which they were delivered, found that they were aimed at addressing the quality and nature of the evidence and arguments presented by the defense rather than being personal attacks upon defense counsel. A prosecutor does not commit misconduct by attacking the defense arguments. Defendant has failed to show this constitutes misconduct.

Finally, defendant complains that the prosecution relied on factors other than the circumstances of the crime several times when making closing arguments in the penalty phase. A review of the record indicates that either the trial court instructed the jury to disregard the objectional argument or the defendant failed to request a curative instruction which

would have eliminated any prejudice. Thus, this claim of error has not been properly preserved for review.

Defendant first cites to the report of proceedings toward the end of the initial closing argument by the prosecution. RP 8236. The prosecutor began an argument about the deterrent value of the death penalty. The defense objected and the court sustained it as there was no evidence to support the argument. RP 8236. The prosecutor then clarified that he was addressing how the death penalty would deter the defendant from committing future crimes and the value of the death penalty as punishment. RP 8236-8238. There was no objection to this argument. Thus, this argument does not provide a claim for appellate review.

Defendant also cites to four places in the rebuttal argument that were the subject of objections. On two of them, the court agreed that the nature of the argument was improper and, *sua sponte*, instructed the jury to disregard it. RP 8293-8294, 8300. The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 657 P.2d 6 (1982). Any prejudice stemming from these two arguments was eliminated by the trial court with its prompt instruction. As for the other two objections, the trial court sustained each on the basis that the argument was beyond the scope of proper rebuttal, but did not find that it was otherwise objectionable. RP 8287, 8297. The court did not instruct the jury to disregard the argument. Id. In neither instance did the defendant ask the court to give a curative instruction. RP 8287, 8297. As

a curative instruction would have eliminated any prejudice stemming from an argument that was beyond the scope of proper rebuttal, the failure to request such an instruction precludes appellate relief. Binkin, 79 Wn. App. at 293-294 (if a curative instruction could have cured the error and the defense failed to request one, then reversal is not required).

Defendant has failed to show that the prosecution committed any misconduct, much less prejudicial misconduct, in the penalty phase.

14. ASSUMING THAT THE SRA'S PROCEDURAL RULES ARE APPLICABLE TO A CAPITAL SENTENCING, DEFENDANT HAS FAILED TO SHOW ANY VIOLATION OF THOSE RULES; THE COURT HAD DISCRETION TO ORDER THE SENTENCE IN THE PIERCE COUNTY CASE TO BE SERVED CONCURRENTLY WITH THE SENTENCE IMPOSED IN THE SPOKANE COUNTY CASE.

In a non-capital sentencing hearing, the determination of whether felony sentences on multiple convictions run consecutively or concurrently to each other is controlled by RCW 9.94A.589 (formerly RCW 9.94A.400).[23] Each of the first three subsections of this statute addresses a different situation. As noted by this court, all "sections ... can be harmonized and all language given effect by applying the language of each subsection to the situation specifically addressed therein." In re Pers. Restraint of Long, 117 Wn.2d 292, 301, 815 P.2d 257 (1991).

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[23] See Appendix F.

The situation addressed in subsection 1 is when "a person is to be sentenced for two or more current offenses." RCW 9.94A.589(1)(a). "Other current offenses" are "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed." RCW 9.94A.525(1).[24] Thus, a court will look to this provision when sentencing a defendant on multiple counts arising from one or more cause numbers. Except for serious violent offenses and some firearm offenses, sentences that are entered on the same day are to be served concurrently. RCW 9.94A.525(1); RCW 9.94A.589(1)(a), (b), and (c).

Under subsection 2 of RCW 9.94A.589, a sentencing court is to impose a consecutive sentence for a felony that *was committed while the offender was under sentence for a different felony*. RCW 9.94A.589(2)(a) (emphasis added). Thus, if a person is convicted of a new felony committed while he was on escape status from prison or work release, the sentence on the new felony must run consecutively to the sentence that was imposed on the prior felony under RCW 9.94A.589(2). Long, 117 Wn.2d at 299.

Finally, under subsection 3, when the court is sentencing "for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony

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[24] See Appendix G.

sentence which has been imposed by any other court ... subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively." RCW 9.94A.589(3). This subsection applies when a person commits a string of felonies before being convicted and sentenced on any of them.

This court construed the meaning of subsection 3 in In re Personal Restraint of Long, 117 Wn.2d at 302-303. This court held that the "statute allows a sentencing judge flexibility to be lenient *or* stern in sentencing." Long, 117 Wn.2d at 302 (emphasis in original).

> In enacting RCW 9.94A.400(3)[recodified as RCW 9.94A.589(3)], the Legislature left to the trial court the determination of whether a concurrent or consecutive sentence should be imposed for cases within the category of the subsection.

Long, 117 Wn.2d at 302. The discretion given to the sentencing judge under RCW 9.94A.589(3) is "unfettered." 117 Wn.2d at 305. The sentencing court is not required to give any reasons for its decision; the only requirement is that, should the court want to impose a consecutive sentence, it must expressly order it. State v. Linderman, 54 Wn. App. 137, 139-140, 772 P.2d 1025, review denied, 113 Wn.2d 1004 (1989); State v. Shilling, 77 Wn. App. 166, 173-176, 889 P.2d 984, review denied, 127 Wn.2d 1006, 898 P.2d 308 (1995); State v. Smith, 74 Wn. App. 844, 851-852, 875 P.2d 1249 (1994).

The above law sets forth statutory requirements regarding consecutive or concurrent sentences under the Sentencing Reform Act of 1981 (SRA) (RCW 9.94A). However, this court has never determined whether the procedural rules in the Sentencing Reform Act of 1981 (SRA) (RCW 9.94A) apply to capital sentencing hearings. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). It is clear that the SRA does not "govern or guide penalty phase juries in their sentencing decisions" as this "function is served by RCW 10.95" Id. at 184. Defendant provides no argument as to why the procedures of the SRA should apply to capital cases; he just asserts that they do. However, if the court does not find a violation of the procedures under the SRA, it will be unnecessary to address the question of applicability.

At the sentencing hearing in this case, defendant argued that under RCW 9.94A, he was entitled to have his death sentence in Pierce County run consecutively to his 408 year sentence imposed in the Spokane County case. RP 8353-8357. The State responded that defendant' reliance on RCW 9.94A.589(1)(b) was misplaced as subsection (3) was the applicable provision to the situation before the court. RP 8357-8361. The court found that under RCW 9.94A.589(3), it could run the Pierce County sentence concurrently with the Spokane County sentence. RP 8362-8363.

The court did not err. At the time the murders were committed in Pierce County, defendant was not under sentence for a felony. At the time of the sentencing for the Pierce County murders, defendant was subject to

the sentence imposed by the Spokane court. Because this Spokane sentence occurred subsequent to the commission of the Pierce County murders, defendant's Pierce County sentence was governed by RCW 9.94A.589(3). Under that authority, the court had unfettered discretion to run the sentence concurrently; in fact, the presumption is that the sentences would run concurrently.

Defendant's argues that RCW 9.94A.589(1)(b) is the controlling provision and that it requires the sentence imposed in Pierce County to run consecutive to the sentence imposed by the Spokane County court; this argument is wholly unsupported by any authority. Moreover, his argument completely ignores the previous construction of RCW 9.94A.589 given by this court in In Re Personal Restraint of Long, discussed above. This court has already held that subsection (3) is the controlling provision in a situation such as the one present here. Because defendant has failed to show any violation of RCW 9.94A this court need not reach a determination of whether the procedural rules in the RCW 9.94A apply to capital cases.

15. WASHINGTON'S DEATH PENALTY STATUTORY SCHEME IS CONSTITUTIONAL.

Defendant attacks Washington's death penalty statutes on constitutional grounds. First, he alleges that it lacks sufficient standards to control prosecutorial discretion in seeking the death penalty thereby

denying him equal protection and due process. He also argues that Washington's death penalty scheme is unconstitutional under Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed 2d 346 (1972) as it is imposed arbitrarily, thereby making it cruel and unusual punishment under the Eighth Amendment. In making this second claim, defendant argues that several factors show the arbitrariness of Washington's death penalty scheme and suggests that it violates the International Covenant on Civil and Political Rights (ICCPR). As argued below, this court has repeatedly rejected such constitutional claims; defendant ignores these prior pronouncements and fails to articulate why this court should revisit these claims.

a. Defendant was not denied the equal protection of the law as RCW 10.95 has sufficient standards to guide prosecutors.

Defendant argues that RCW 10.95 et seq. is unconstitutional because it allows prosecutors too much unguided discretion in the decision to seek the death penalty. This court has repeatedly rejected this argument. State v. Cross, ___ Wn.2d ___, ___ P.3d ___ (2006) (Slip Opinion in case no. 71267-1, filed March 30, 2006). State v. Benn, 120 Wn.2d 631, 667, 845 P.2d 289 (1993); State v. Lord, 117 Wn.2d 829, 916, 822 P.2d 177 (1991); State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984); State v. Rupe, 101 Wn.2d 664, 699-700, 683 P.2d 571(1984).

These decisions are consistent with the analysis in the United States Supreme Court's decision in Gregg v. Georgia, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Gregg contended that because: 1) the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense, and to plea bargain with them; 2) the jury had the ability to convict of a lesser offense even when the evidence was sufficient for the capital offense; and 3) the governor, or other executive officer, might commute a death sentence, that the capital penalty statutes in Georgia were arbitrary and capricious in violation of Furman v. Georgia, supra. The court disagreed noting that:

> At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg v. Georgia, 428 U.S. at 199. Thus, the decision in Furman requires that juries are provided with standards by which to decide whether to impose the death penalty on a person who has been convicted of a capital offense. It does not apply to the prosecutor's decision not to seek the death penalty. Rupe, 101 Wn.2d at 700.

Defendant argues that under the principles set forth in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L. Ed. 2d 388 (2000), the lack of standards among counties for determining who shall face the death penalty violates equal protection of the law. Appellant's brief at p. 55. In Gore the issue was the manner in which ballot counting was evaluated. 98 U.S. at 106. Florida's guidelines for count of legally cast votes was to consider the "intent of the voter." Id. While the Supreme Court found this "unobjectionable as an abstract proposition and starting principle," it found it lacking in "specific standards to ensure its equal protection." Id.

RCW 10.95 provides far more concrete guidelines than to consider the "intent of the voter" by giving the jury a question to answer and factors to consider. RCW 10.95.060(4); 10.95.070.[25] There is no merit to defendant's equal protection claim. Moreover, defendant fails to explain why a case on elections is more persuasive than Gregg v. Georgia, a case dealing with the constitutionality of prosecutorial discretion in the selection of defendants who may face the death penalty. Defendant cannot avoid the existence of controlling authority simply by pretending it does not exist. The Supreme Court recently rejected a challenge based on Bush v. Gore in State v. Cross, supra. Additionally, Washington law is clear that the exercise of a prosecutor's discretion does not violate equal protection of the law.

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[25] See Appendix C.

Equal protection law is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements; however, there is no constitutional defect when the crimes which the prosecutor has discretion to charge have different elements. State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984).

In Campbell, this court held that there is no equal protection violation because a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment - "namely, an absence of [or an insufficiency of] mitigating circumstances." 103 Wn.2d at 25.

Contrary to defendant's assertion, there are concrete guidelines for prosecutors to follow. Before a prosecutor may seek the death penalty the prosecutor must consider: 1) whether there is sufficient evidence to prove a premeditated murder; 2) whether there is sufficient evidence to prove an aggravating factor; and, 3) whether there are sufficient mitigating circumstances to merit leniency. RCW 10.95.020, 10.95.040.

This court should once again reject the argument that RCW 10.95 et seq, is unconstitutional because it fails to provide the prosecutor with sufficient standards for the exercise of its discretion.

b. Cruel and unusual due to arbitrariness.

The Eighth Amendment to the Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted." The Eighth Amendment applies to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

The Eighth Amendment requires that a state's sentencing scheme "must not allow the death penalty to be wantonly or freakishly imposed, it must direct and limit jury discretion, to minimize the risk of arbitrary or capricious action, and it must allow particularized consideration of relevant aspects of the character and record of each defendant, and the circumstances of the offense, before imposition of the sentence." In re Brown, 143 Wn.2d 431, 460, 21 P.3d 687 (2001) (quoting State v. Dodd, 120 Wn.2d 1, 13-14 n.2, 838 P.2d 86 (1992)).

Defendant contends that Washington's death penalty is arbitrary because: (1) it is racial disproportionate; (2) the sentence is "not imposed and carried out on the worst homicide offenders;" (3) that there is geographical disparity in the frequency with which the death penalty is sought in different counties; (4) arbitrariness in the number of cases where a person has actually been executed, and (5) there may be people subject to the death penalty who are innocent, (6) it is imposed in an infrequent manner, and (7) it violates the ICCPR.

Defendant ignores this court's repeated rejection of claims that Washington's sentencing scheme allows wanton and freakish imposition of the death penalty. In re Brown, 143 Wn.2d 431, 460-461, 21 P.3d 687 (2001) (rejecting claim that Washington's death penalty uniquely inflicted

upon the poor); State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001) (rejecting claim that Washington's death penalty imposed disproportionately against African-Americans); State v. Dodd, 120 Wn.2d 1, 838 P.2d 86 (1992) (rejecting claim that scheme which allows execution of person who waives appeal is cruel and unusual); State v. Rupe, 101 Wn.2d 664697-701, 683 P.2d 571 (1984) (holding there is sufficient guidance to avoid arbitrary infliction of the death penalty).

Because defendant's arguments ignore this court's past decisions, he fails to present any compelling reason to re-examine those precedents. Nevertheless, the State will briefly address defendant's broad claims of arbitrariness.

i. Racial discrimination.

Defendant asserts that Washington's death penalty State produces results that are "racially disparate". Appellant's Brief at p. 208. His only evidence to this claim is a citation to the Department of Corrections (DOC) web site.[26] The information on the DOC web site indicates that since 1904 there have been 77 executions in Washington of which 65 were Caucasians. See Appendix I. In the post-Furman era, four have been

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[26] The State could not find any information at the web address cited in the brief – www.wa.gov/doc/deathpnlty.htm, but could find some death penalty related information at this address www.doc.wa.gov/deathpenalty/deathpnlty.htm. See Appendix H. The web page had a link to a list of all persons executed in the state since 1904. Appendix I.

executed -three Caucasian (Dodd, Campbell and Elledge) and one Hispanic (Sagastegui). Appendix I. Defendant presents no argument as to how these statistics demonstrate racial disparity in the application of the death penalty in Washington. In State v. Woods, 143 Wn.2d at 619, this court rejected a similar argument. In Woods, an African-American defendant was sentenced to death by an all-white jury; Woods claimed on appeal that the death penalty was applied disproportionately against African-Americans, particularly in Spokane County. Id. This court noted that in 1987 the United States Supreme Court held that it had not been presented with persuasive evidence that the death penalty was imposed against racial minorities in an unconstitutional manner in the state of Georgia. Id. (citing McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)). This court held that a defendant asserting racial prejudice must present "exceptionally clear proof" of discrimination before the court will find the imposition of the death penalty unconstitutional. Id. Defendant completely fails in his burden of presenting "exceptionally clear proof." Defendant presents no evidence that there is racial disparity in the application of Washington's death penalty provisions.

ii. Worst offenders.

Defendant argues that Washington's death penalty provisions are arbitrary because the sentence is "not imposed and carried out on the worst

homicide offenders." Appellant' Brief at p. 209. Defendant complains that persons convicted of multiple murders, such as Gary Ridgeway[27], Benjamin Ng[28], David Rice[29], and Lawrence Sullens[30], have escaped the death penalty whereas persons who commit single victim homicides have not. Defendant does not mention the multiple murderers who have been sentenced to death and those that have been executed.[31] A review of the Trial Reports on the individuals referred to by defendant indicates that a special sentencing proceeding was held in only two of the cases, Benjamin Ng's and David Rice's. The jury could not reach unanimous agreement on Mr. Ng where, in the court's opinion, there was credible evidence of mitigating evidence. Report of the Trial Court No. 14. The jury returned a death verdict on David Rice. Report of the Trial Court No. 43. A jury never had the opportunity to consider imposition of the death penalty on the others.

Essentially, this argument is no different that the one made earlier about the amount of discretion given to prosecutors in seeking the death penalty except that it also includes a complaint about the amount of discretion given to juries. This attack on the discretion that is given to

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[27] See, Trial Report No. 265.
[28] See, Trial Report No. 14.
[29] See, Trial Report No. 43.
[30] See, Trial Report No. 69.
[31] Of the seven other men currently on death row, three of them - Darold Stensen, Dwayne Woods, and Dayva Cross- were convicted of multiple murders. Appendix I. Three of the four persons executed – Campbell, Dodd, and Sagastagui- were convicted of multiple murders. Appendix I.

various entities at different points in the criminal justice system is the same type of claim rejected by the United States Supreme Court in Gregg v. Georgia, discussed supra.

Defendant's ultimate complaint here is that jurors and prosecutors exercise discretion. In State v. Rupe, this court already rejected the argument that under Washington's statute the jury is given excessive discretion as to which persons who are convicted of aggravated murder will be put to death. 101 Wn.2d at 699. Prior to the Supreme Court's opinion in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (per curiam), jurors had "untrammeled discretion" to impose the death penalty. Our Legislature addressed those concerns in RCW 10.95. A jury must consider evidence of mitigating factors and details of the defendant's crime and weigh them against each other. As no two defendants will have the same personal history and no two homicides will present exactly the same facts, every jury will be asked to assess a unique situation. However, every jury will be given the same guidelines to apply to the facts. As this court noted in Brett, "the legislative guidelines contained in RCW 10.95 within which the jury must exercise its discretion ensure proportionality and eliminate the ability of the jury, in all but the most aberrant case, to impose the death sentence in a wanton and freakish manner." 126 Wn.2d 136, 210-11, 892 P.2d 29 (1995). The guidelines of RCW 10.95.070 properly curtail the juror's discretion and defendant's complaint has no merit.

The United States Supreme Court has repeatedly rejected claims that the power of a prosecutor or jury to exercise discretion will invalidate a capital penalty scheme under the Eighth Amendment.

> Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." 2 W. LaFave & J. Israel, Criminal Procedure § 13.2(a), p. 160 (1984). As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. ...Of course, "the power to be lenient [also] is the power to discriminate," K. Davis, Discretionary Justice 170 (1973), but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." Gregg v. Georgia, 428 U.S., at 200, n. 50.

McCleskey v. Kemp, 481 U.S. 279, 311-312, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (footnotes omitted). In McCleskey, the court held that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants[,] who may be similarly situated[,] did not receive the death penalty." McCleskey 481 U.S. at 306-307. This is precisely the type of claim defendant tries to make here. He does not challenge the method by which his jury reached its determination to impose the death penalty, he only argues that the

outcome in his case and some other cases seem inconsistent. This court should reject his argument as failing to raise a constitutional issue.

iii. Geographical nature.

Defendant complains there is a geographical disparity in the frequency with which the death penalty is sought and imposed in different counties. Defendant contends that in Pierce County the death penalty is sought and imposed "far more often than any other of Washington's 39 counties." Appellant's Brief at p.210. While the State does not concede that citing to a newspaper article which makes this claim provides sufficient evidence to prove the assertion, the quality of the evidence supporting this claim does not affect the constitutional analysis. This is but another variation in the argument that the system allows for variation in how prosecutors exercise their discretion. In State v. Dictado, this court rejected the argument that the statute violates equal protection by giving the prosecutor unfettered discretion to file capital or noncapital crimes. Dictado, 102 Wn.2d 277, 297, 687 P.2d 172 (1984). As discussed above, the United State Supreme Court does not recognize the presence of prosecutorial discretion in seeking the death penalty as presenting an issue of arbitrariness under the Eighth Amendment. Gregg v. Georgia, 428 U.S., at 200, n. 50; McCleskey v. Kemp, 481 U.S. at 311-312. Defendant does not make a constitutional claim.

iv. Actual death sentence carried out.

Defendant complains that the punishment is arbitrary because three of the four men who have received the death penalty have volunteered for execution. Defendant fails to articulate how a choice made by some persons facing the death penalty renders the Washington's capital penalty provisions unconstitutional. He does not allege error in the statutory provisions or the current appellate review process used to assure a fair trial and sentence. Without a constitutionally based complaint, he cannot attack the method in which the sentence is actually carried out.

v. Actual innocence.

Defendant complains that execution of innocent persons is the ultimate in "arbitrary imposition." Appellant's brief at 211.

Defendant does not articulate in what manner Washington's capital punishment system poses risk for execution of the innocent. Presumably, defendant is arguing that there is always a risk an innocent person will be executed. Washington takes several measures to minimize that risk. First, "capital sentencing determinations are subjected to a correspondingly higher degree of scrutiny than sentencing in noncapital cases." Lord, 117 Wn.2d at 888. Review of a death sentence will be by the state's highest court. RCW 10.95.100. A defendant may always petition the court for a new trial based on "newly discovered evidence." RCW 10.73.100(1). The legislature's enactment of RCW 10.73.170 in 2000 shows that

Washington is committed to supplying the resources and tools for defendants to seek DNA testing results that might be used to collaterally attack their convictions. The State is unaware of any death row inmates in Washington who have used such testing to exonerate themselves. In fact, the State is unaware of any former death row inmate in Washington that has been shown to be actually innocent.[32] Thus, it appears that the safeguards with the judicial system are working. Finally, Const. Art. 3, § 9, 11 gives the Governor of the State of Washington the power of executive clemency.

Defendant cites to Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) as support for his claim that execution of an innocent person is "arbitrary imposition" of the death penalty. His reliance on this case is misplaced. In Herrera, the United States Supreme Court rejected that a claim of "actual innocence" was a colorable constitutional claim under either the Eighth or Fourteenth Amendment allowing for federal habeas corpus relief. 506 U.S. at 396. It stated "'due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'"

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[32] The State is aware that several entities opposed to the death penalty claim that Benjamin Harris has been shown to be "actually innocent." These claims ignore the fact that Mr. Harris acknowledged shooting the victim. Harris v. Blodgett, 853 F. Supp. 1239, 1249, 1261-64 (W.D. Wash. 1994), aff'd 64 F.3d 1432 (9th Cir. 1995).

Herrera, 506 U.S. at 399 (quoting Patterson v. New York, 432 U.S. 197, 208, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)). As noted by one district court the "Supreme Court's decision in Herrera thus forecloses the argument that the inherent fallibility of the criminal justice system supports a due process attack on the death penalty ..."it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." United States v. Church, 217 F. Supp. 2d 700, 702 (D. Va. 2002) (quoting Herrera, 506 U.S. at 415). This country has always relied upon executive clemency as a fail safe to right the wrongs inherent in the criminal process. Herrera, 506 U.S. at 415.

As outlined above the Washington statute provides considerable protections designed to prevent the execution of those that are "actually innocent." The constitution is satisfied once a defendant receives all of the due process that the law affords cannot. Such a defendant cannot complain that his punishment is cruel or unusual simply because he also claims that he is actually innocent. Furthermore, discussions of actual innocence have little application to defendant's case as he did not deny his guilt in the murders of Connie Ellis and Melinda Mercer.

vi. Infrequency and purposelessness.

Defendant claims that the infrequency of imposition of the penalty in relation to the number of crimes for which it is legally authorized nullifies the deterrent effect. Appellant's Brief at p. 212-214.

First, defendant does not identify where he acquired his statistics for the number of murders committed in Washington cited in his brief. Thus, he presents an entire argument predicated upon unsupported assertions. For this reason, the court should simply ignore this argument But even if the court were to ignore this failing, essentially his argument is one of public policy – the death penalty should be abolished because it is not an effective deterrent.

As noted by the United States Supreme Court, the death penalty is said to serve two principal social purposes: retribution and deterrence. Gregg v. Georgia, 428 U.S. at 183. The deterrence effect may refer to impacting the number of capital crimes committed by other prospective offenders or it may refer to the incapacitation of the convicted defendant and the consequent prevention of any crimes that he may commit in the future. Id. Retribution, by itself, is a proper focus of the law:

> Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Gregg v. Georgia, 428 U.S. at 184. The Supreme Court concluded that capital punishment, per se, does not violate the Eighth Amendment. Gregg, 428 U.S. at 187. As for the "value of capital punishment as a deterrent of crime," the United State Supreme Court concluded that this was "a complex factual issue[,] the resolution of which properly rests with

the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." Gregg , 428 U.S. at 186. Defendant presents no reason why this court should come to a different conclusion. The court has previously rejected an argument that the death penalty has no deterrent effect. State v. Rupe, 101 Wn.2d at 698.

Defendant may well believe that his execution will have no deterrent effect on other prospective offenders, but it will unquestionably prevent him from offending again and his death will provide retribution for his acts. Whether this is good policy or bad is not for the courts to decide. The people of the State of Washington have not used the initiative process to repeal the death penalty and the Legislature shows no indication of repealing it by the legislative process. Defendant must take his policy argument to the proper forum as he does not raise a constitutional claim that can be assessed by the courts.

vii. ICCPR.

Defendant also contends that the current sentencing statute violates the Eighth Amendment, State Const. Art 1, § 14, and the "International Covenant on Civil and Political Rights" (ICCPR). Appellant' Brief at 215. Defendant provides no analysis or argument as to why this is the case. Naked castings into the constitutional sea will not be considered by this court. See In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

Apparently, the logic of his argument is: 1) the death penalty is arbitrary; 2) the ICCPR bars arbitrary deprivation of life; therefore, 3) the death penalty is barred by the ICCPR. This syllogistic argument sheds no additional light on the issue before this court. Arbitrariness is decided under constitutional principles. If a defendant can show that a death penalty statute is arbitrary under a constitutional analysis, then reliance upon the ICCPR is unnecessary as the constitution will provide for relief. If he cannot show that the death penalty is unconstitutionally arbitrary, then the ICCPR is not implicated. As argued above, this court has repeatedly rejected claims that Washington's death penalty statute is arbitrary under constitutional standards.

16. MISSING TRIAL REPORTS DO NOT PRECLUDE THE COURT FROM ENGAGING IN MEANINGFUL PROPORTIONALITY REVIEW.

RCW 10.95.120[33] requires the trial court, within thirty days after entry of the judgment and sentence in every aggravated murder case, to submit a report to the Supreme Court of Washington. These reports are used in mandatory proportionality review in every case where the death penalty has been imposed. State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1996).

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[33] See Appendix C.

Defendant asserts that the Supreme Court's set of trial report are "incomplete and inaccurate" thereby "rendering proportionality review impossible." Appellant's brief at p 216. He asserts that the test mandated by RCW 10.95.130(2)(b) requires a complete set of reports. Appellant's brief at p 217. This court has previously held that the statute does not impose such a limitation. State v. Cross, ___Wn.2d ___, ___ P.3d ___ (2006) (Slip Opinion in case no. 71267-1, filed March 30, 2006). In re Personal Restraint of Stenson, 153 Wn.2d 137, 149-150, 102 P.3d 151 (2004).

> RCW 10.95.130(2)(b) states in the relevant part:
>
> For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120.

This language plainly requires the court to consider the reports that *have been filed.* It does not require the court to consider all the reports that are mandated under RCW 10.95.120 - just those that have been filed. The State agrees that the court should try to ensure that all of the mandated reports are filed, but the legislature seemed to anticipate that there might be omissions. Thus, the language of the statute allows for review to proceed on the reports that are available. Stenson, 153 Wn.2d at 149-150.

Currently, there are 271 reports. Defendant asserts that there are missing reports; his only evidence to support this claim is a citation to a law review article published in 2004. Appellant's brief at 219. The article claims that there are twelve or 13 missing reports, but there are reports for several of the cases listed as "missing reports" in that article. See Kaufman- Osborn, Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons From Washington State), 79 Wash. L. Rev. 775, 817 n.219 (2004)(reports have been filed for R. Anderson #264, A. Baranyi # 267, M. Thornton # 238, K.Cruz #256, and D. Durga #268- cases all listed as missing reports). The law review article is either inaccurate or out of date. Defendant makes no effort to independently provide evidence that there are cases where a defendant has been convicted of aggravated murder for which there is no report on file. Defendant asserts that because the missing reports all pertain to persons serving a term of life without the possibility of parole, that using an incomplete set of reports will skew the calculation in favor of death. Without having any information about the nature of the alleged cases without reports on file, there is no showing that such cases would particularly be relevant to the proportionality review in the instant case. Even assuming there are a few reports missing, defendant fails to make any sort of credible argument why the absence of less than a dozen reports prevents conducting meaningful proportionality review.

Defendant's argument that proportionality review is not possible because some of the reports are out-of-date and inaccurate was rejected by this court previously. State v. Woods, 143 Wn.2d 561, 613, 23 P.3d 1046 (2001)(noting that the legislature did not require trial judge reports to be updated after appeal to reflect the current sentencing status in capital cases). Similarly, defendant argues that Washington's manner of conducting proportionality review violates due process citing Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), *aff'd on other grounds*, 64 F.3d 1432 (9th Cir. 1995). This court has also rejected arguments premised on Harris v. Blodgett. State v. Woods, 143 Wn.2d at 612; In re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), habeas corpus granted on other grounds by Benn v. Wood, 2000 U.S. Dist. LEXIS 12741, 2000 WL 1031361 (W.D. Wash. June 30, 2000).

Defendant has not shown that proportionality review, using the 271 filed reports that have been filed, fails to comply with the provisions of RCW 10.95.130(2)(b). Because defendant has failed to show a violation of the procedures in RCW 10.95.130, there is no need to address his argument that proceeding with proportionality review with the existing set of reports would violate the federal or state due process clause. This court should continue efforts to ensure compliance with RCW 10.95.120. In the meantime, it should proceed with proportionality review using the case reports already filed, just as the RCW 10.95.130(2)(b) provides.

Defendant contends that even though the Eighth Amendment of the federal constitution does not require any sort of proportionality review, the state constitution prohibition against cruel punishment, Const. Art.I, § 14, requires it and that it be done with a complete set of trial reports. Appellant's brief at pp. 226- 230. Defendant asserts that because this court has already found broader protections under the state constitutional provision that he need not do a full Gunwall analysis which is usually required before the court will undergo a constitutional assessment based upon independent state grounds. The State disagrees. The court has found greater protection in another context. State v. Fain, 94 Wn.2d 387, 392, 617 P.2d 720 (1980) (habitual criminal sentence of life constitutes "cruel" punishment when given for three nonviolent crimes involving small amounts of property). However, when faced with a challenge regarding appellate review in a death penalty case, this court held the federal and state provisions were coextensive. In State v. Dodd, 120 Wn.2d 1, 838 P.2d 86 (1992), the court noted:

> The drafters of the constitution did not adopt the ordinary phrase "cruel and unusual" because they thought the term "cruel" was "sufficient". State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980); Journal of the Washington State Constitutional Convention, 1889, at 501-02 (B. Rosenow ed. 1962). The constitutional record does not indicate whether the framers believed the term "cruel" was synonymous with or more expansive than the term "cruel and unusual". Thus, it is not clear that the parallel provisions are significantly different.

State v. Dodd, 120 Wn.2d at 21.

While Washington has had a death penalty for most of its existence as a state, the mandatory review procedures, including proportionality review, are a recent invention. The Legislature did not require automatic review of a death sentence or conviction before 1977. State v. Dodd, 120 Wn.2d at 22. Early appeals in capital cases addressed trial error, not the propriety of the jury's death verdict; if the conviction was affirmed, the sentence was a forgone conclusion. State v. Walton, 130 Wash. 649, 228 P. 841 (1924); State v. Moretti, 66 Wash. 537,120 P. 102 (1912); State v. Fillpot, 51 Wash. 223, 98 P. 659 (1908); State v. Dalton, 43 Wash. 278, 86 P. 590 (1906). Challenges to a death sentence on the grounds that it constitutes "cruel punishment" is a recent development in the law. There is no evidence, historically, to indicate that the drafters of our constitution meant the phrase "cruel punishment" in Const. Art.I, § 14 to refer to "the imposition of the death penalty without proportionality review." Of course, this court determined long ago that that the imposition of the death penalty, per se, does not violate Art.I, § 14 of the Washington State Constitution. State v. Smith, 74 Wn.2d 744, 777-778, 446 P.2d 571 (1968), vacated in part (on federal grounds), by Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747(1972), overruled on other grounds, by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975); see also, State v. Cerny, 78 Wn.2d 845, 854-855, 480 P.2d 199 (1971)("The debate over the wisdom of imposing the death penalty has been carried far and wide from legal and nonlegal centers. The fact remains that the courts

have been slow to interfere with the judgment of the state legislature as to appropriate punishment. As yet, there is not federal proscription against imposition of the death penalty; and this court will not substitute its judgment for that of the legislature in prescribing appropriate punishment for criminal offenses.")

In Dodd, the court rejected an argument that the state constitution forbids a capital defendant from waiving general appellate review. This court held that, in the context of Washington's death penalty review procedures, it does not interpret the cruel punishment clause of the state constitution more broadly than the Eighth Amendment to the federal constitution. Dodd, 120 Wn.2d 21-22; see also State v. Gentry, 125 Wn.2d 570, 631, 888 P.2d 1105 (1995) (state prohibition against cruel punishment does not preclude admission of victim impact evidence in penalty phase). As defendant is also raising a challenge to the death penalty review procedures under the state constitution, the holding of Dodd controls; the state constitution does not provide greater protection in this area.

17. THIS COURT SHOULD CONCLUDE UNDER MANDATORY PROPORTIONALITY REVIEW THAT THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE AFFIRMATIVE FINDING BY THE JURY THAT: 1) THERE WERE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT LENIENCY; 2) THE SENTENCE OF DEATH IS NOT EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES; 3) THE DEATH SENTENCE WAS NOT BROUGHT ABOUT BY PASSION OR PREJUDICE; AND, 4) THE DEFENDANT IS NOT MENTALLY RETARDED.

This court must review defendant's death sentence as required by RCW 10.95 to determine: (a) whether there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to warrant leniency; (b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; (c) whether the sentence of death was brought about by passion or prejudice; and (d) whether the defendant was mentally retarded.

a. There was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency.

In addressing the sufficiency of evidence in a capital case, this court determines whether sufficient evidence exists to support the jury's finding that there were not sufficient mitigating circumstances to merit leniency. Elmore, 985 P.2d at 321, citing State v. Stenson, 132 Wn.2d at

756. The test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found sufficient evidence to justify the jury's finding beyond a reasonable doubt. Brown, 132 Wn.2d at 551; State v. Gentry, 125 Wn.2d at 654.

In applying this test, the court does not duplicate the jury's role and reweigh the aggravating circumstances against the mitigating factors, but rather the court considers the circumstances of the crime along with any mitigating factors and determines whether a rational jury could have concluded the mitigating circumstances do not outweigh the circumstances of the crime. Elmore, supra, citing State v. Dodd, 120 Wn.2d 1, 24-25, 838 P.2d 86 (1992); Rice, 110 Wn.2d at 623-25. The mere presence of mitigating factors does not require reversal if the jury is convinced the circumstances of the crime outweigh the proposed mitigating factors. Elmore, supra, citing Brown, 132 Wn.2d at 553.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find sufficient evidence to support the jury's conclusion that defendant did not merit leniency.

Defendant's crimes are particularly disturbing. A seemingly upstanding citizen and family man, defendant would approach women working in prostitution intending to rob and murder them. He devised a system for committing crimes, which he used to kill Melinda Mercer and Connie LaFontaine Ellis. He shot them in the head with a .25 caliber firearm. He encased their heads in plastic grocery bags, cutting off air

supply and controlling the spread of blood and body matter. He would also have repeated intercourse with his victims, possibly postmortem, as his semen left DNA evidence in their mouths, vaginas, and rectums. Women who had engaged in prostitution with defendant testified that he always used a condom during sexual intercourse on their "dates." Defendant would pick up his victims in his own vehicles, including a van with a platform bed in the back. This is where several of his victims, including Ms. Ellis, were murdered.

On December 6, 1998, defendant picked up Ms. Mercer on a street in Seattle while he was in Western Washington for week long military reserve duty. RP 5324,5341, 6337-6344, 6349. Ms. Mercer had gone out, for a short time, to earn some money prostituting herself so that she and a friend could buy drugs later that night. RP 5326, 5329. Defendant shot Ms. Mercer three times in the back left side of the head; the gun was held against her head. RP 5474, 5498. He used the same gun on her that he had used to kill four other women. RP 6414. The positioning of the bullets wounds and the blood on her shirt are consistent with her body being upright but her head being down, possibly performing fellatio as defendant sat on the platform bed in the back of his van. RP 5474-5475. Ms. Mercer's head wounds would not have incapacitated her immediately. RP 5499, 5502-5504. There were four plastic grocery sacks encasing her head. RP 5372, 5379. The innermost two bags on Ms. Mercer were torn around the mouth and nose suggesting that she may have been still alive

for a while and chewing on the bags. RP 5539, 5627. Sperm was found on the swabs taken from her oral, anal, and vaginal cavities. RP 6456-6457. Defendant's DNA was linked to this sperm. RP 6754, 6780-6781. Her remains were dragged through blackberry bushes when he dumped her body in a vacant lot used as a dump site for garbage. RP 5314, 5365-5369, 5373, 5377-5378, 5404. No money or purse was found on or around her body. RP 5374-5375, 5468.

Ms. Ellis, was last known to be alive on September 17, 1998, with she received a dose of methadone from a treatment program she was in. RP 5764, 6014, 6020. She supported herself by working in prostitution. RP 5765, 6026. Defendant was again in the Tacoma area at that time for another week of military duty. RP 6351-6352. Her body was found on October 13, 1998, it was badly decomposed. RP 5739, 5741, 5752, 5753. Her remains were also dumped off by the side of the road. RP 4379, 5750. She had one gunshot wound to the left side of her head, relatively the same position as defendant's other victims. RP 5918-5919. Her head was encased in three plastic grocery sacks. RP 5908. No money or purse was found on or around her body. RP 5753-5754, 5906-5907. This was not the same gun as used on Ms. Mercer, but it was the same gun used on two other victims. RP 6427, 6430. Ms. Ellis's blood was found inside defendant's van. RP 6639, 6767-6768. When a Spokane detective heard of the discovery of Ms. Ellis's body, he called a detective in Tacoma to ask if the body had plastic bags on her head. RP 4853-4855. It was this

call that began detectives connecting the 10 unsolved Spokane murders with the murders of Ms. Mercer and Ms. Ellis. RP 5417-5418.

Additional facts have been set forth in some detail at earlier points in this brief. Ruthless, cold-blooded, well-planned, and sociopathic are all apt terms to describe defendant's crimes.

In this case, defendant offered mitigation evidence for the jury to consider in determining whether he merited leniency. Much of the evidence gave the jury background information about the defendant's life. Two of defendant's former high school teachers and coaches testified that when they knew defendant, from 1967 to 1971, he was a excellent student who was very quiet and unassuming. RP 7786-7788, 7792-7794. Defendant always appeared to be well fed and cared for and living in a loving home. RP 7789-7791, 7794-7796. The was no obvious dysfunction with defendant or his family. RP 7798.

He presented the testimony of family members and friends. Defendant's father testified the defendant had two older half sisters and a younger sister. RP 7801. The family lived in a home in Oak Harbor where his father worked at the naval air station. RP 7804-7805. Defendant's father testified that defendant described his home as a very loving home; he thought that defendant was a happy child, very respectful, and responsible. RP 7807-7812. Sometime around 1973 or '74, defendant got married and moved away to go to Walla Walla College. RP 7818. That marriage began to fail in 1974 or '75 and defendant married his

second wife, Linda, in 1975 before he was divorced from his first wife. RP 7818-7821. Defendant had five children with his second wife. RP 7820-7821. Defendant wanted to go to medical school, but for financial reasons enlisted in the Army, where he became a helicopter pilot. RP 7822-7825. Defendant spent many years stationed out of state and overseas. RP 7825.

Defendant's father and family were completely surprised and devastated by the fact that defendant committed several murders. RP 7827-7828. Defendant's father testified that his son has become more spiritual since being incarcerated for the murders. RP 7829-7830. Defendant's younger sister gave similar testimony as their father. RP 7854-7866. She did not have much contact with her brother after 1974 because she was out of the country doing missionary work. RP 7870. A family pastor also thought the family (defendant, his parents, and siblings) had an idyllic life. RP 7883.

Defendant presented the testimony of a maintenance test pilot who met defendant in 1991 and worked with him for two years. RP 7768-7774. He regarded defendant as a mentor and testified that defendant was a top notch pilot and highly regarded within the Army. RP 7771-7774. Other witnesses who served with defendant in the military also testified that he was a top pilot and instructor. RP 7913-7924, 7926-7930, 7933-7935.

Defendant presented the testimony of pastors who communicated with defendant when he was in jail. RP 7881-7882, 8077-8092, 8097-8110. To two of them, defendant repeatedly indicated that he was remorseful. RP 8081-8082, 8103. Defendant wrote several religious articles and letters; these pastors would use these writings in their ministry with other inmates and in their churches. RP 8083-8091, 8102-8103. Defendant indicated to them that he "accepted the Lord" after his arrest in Spokane. RP 8092. Defendant was not attending church prior to his arrest. RP 8107.

Two fellow inmates at the Pierce County Jail testified that defendant frequently talked about scripture to others and that they had found some of what defendant had to say helpful. RP 7888-7890, 7898-7901.

Defendant also presented the testimony of correctional officers from the Spokane County jail who testified that his behavior, while in lock down 23 hours a day in a cell by himself, was good. RP 7942-7945, 7946-7948, 7949-7950, 7952-7953. There was similar testimony from correctional officers from the Pierce County jail. RP 7954-7957, 7958-7959, 7960-7962, 7963-7966. There was nothing exceptional about his behavior - many other inmates behaved similarly. RP 7957, 7962, 7966. Defendant had no negative incidents in his behavioral log. RP 7982.

During his allocution, defendant apologized to the families of the victims and spoke of how he had found God after his arrest. RP 8194-

8201. He offered no explanation for his actions and acknowledged that he was not providing any such information. RP 8200.

Throughout his life, defendant had a place to live, food to eat, and people who loved him. There was no evidence that he ever was subjected to abuse or lived in a dysfunctional family. No evidence was presented that shed any light on why a person with so many advantages would become a serial killer whose crimes spread over three decades. While defendant claimed to be a changed man, the evidence before the jury was that he was very adept at presenting one persona to the public while hiding his true character. It is not surprising that the jury found the evidence of defendant's post–arrest religious renewal and of his good behavior in custody insufficient to warrant leniency for his cold-blooded murder of Melinda Mercer and Connie Ellis.

Viewing all the evidence in the light most favorable to the State, this court should find that the State presented sufficient evidence to support the jury's finding that there were not sufficient mitigating circumstances to warrant leniency.

b. The sentence was not disproportionate when compared to other similar cases.

In performing its proportionality review, this court compares the case to *all* aggravated murder cases, to see whether the sentence is wanton, freakish, or otherwise disproportionate. In performing this review, this

Court has looked at a number of factors, including the nature of the crime, the defendant's criminal record, and the extent of any mitigating factors. State v. Pirtle, 127 Wn.2d 628, 687, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996); see also Gentry, 125 Wn.2d at 653-54; State v. Benn, 120 Wn.2d 631, 677-78, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993); State v. Rice, 110 Wn.2d 577, 623-25, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989). The court has acknowledged that this type of review may not be easily quantified:

> We have quantified those factors that are easily quantifiable in order to be as objective as possible. By this we do not suggest proportionality as is a statistical task or can be reduced to a number, but only that numbers can point to areas of concern. At its heart, proportionality review will always be a subjective judgment as to whether a particular death sentence fairly represents the values inherent in Washington's sentencing scheme for aggravated murder.

Pirtle, 127 Wn.2d at 687. A statistical approach is not required. State v. Elmore, 139 Wn.2d at 308. If the facts of defendant's case are similar to some of the facts taken from cases in which the death penalty was upheld, the proportionality review is satisfied. Id.

RCW 10.95.130(2)(b) defines the comparison pool as follows:

> "Similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed

> with the supreme court under RCW 10.95.120 (emphasis added).

The pool of similar cases includes those in which the death penalty was sought and those in which it was not. State v. Davis, 141 Wn.2d 798, 880, 10 P.3d 977 (2000).

Proportionality review does not preclude variation on a case-by-case basis, nor does it guarantee that the death penalty is always imposed in superficially similar cases. Lord, 117 Wn.2d at 910. Precise uniformity is unworkable because of the nature of the offenses and because juries are directed to tailor their decision to the individual circumstances of the crime. Id. "Precise uniformity is not possible because 'the brutal and extreme [crimes] with which we deal in death penalty cases are unique and cannot be matched up like so many points on a graph.'" State v. Davis, 141 Wn. 2d at 881.

Further, a decision to afford one defendant mercy, and not another, does not violate the constitution. State v. Mak, 105 Wn.2d 692, 724, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986) (quoting Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L. Ed. 2d 859 (1976)). Essentially all of defendants arguments regarding proportionality are that others who committed crimes with similar features either did receive the death penalty. This is precisely the type of analysis rejected by this court in Lord and Davis.

i. Aggravating circumstances.

Only one aggravating factor is needed for imposition of the death penalty. RCW 10.95.030(2). Previous cases have found the death penalty not disproportionate when based on a single aggravator[34].

In this case, the jury found three aggravating factors on each count of murder: 1) the murder was committed in course of, in furtherance of, or in the immediate flight from the crime of robbery in the first or second degree; 2) the murder was committed to conceal the commission of a crime; and, 3) defendant killed more than one victim and the murders were part of a common scheme or plan. CP 4164-4165, 4168-4169. The finding of three aggravating circumstances marks this crime as one of the most serious. State v. Woods, 143 Wn.2d 561, 617, 23 P.3d 1046 (2001).

ii. Nature of the crime.

This nature of this crime was described in the section addressing the sufficiency of the evidence to support the jury's determination that the defendant did not merit leniency. The planning and disregard for human life exhibited by defendant's crimes are comparable to the facts in State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996) (Brett's plan was to choose an elderly couple's house in a rich neighborhood, restrain the victims, force them to withdraw their money

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[34] See Report of the Trial Judge (TR) for: S. Luvene, TR no. 135; J. Gentry, TR no. 119; G. Benn, TR no. 75; B. Harris, TR no. 29.

from the bank, then kill them by injecting them with a toxic substance) and those in State v. Pirtle, *supra*, 127 Wn.2d at 628(after being fired for sexual harassment, Pirtle planned a revenge killing at his place of former employ).

Defendant's targeting of a certain type of victim is similar to that seen in State v. Dodd, 120 Wn.2d 1, 838 P.2d 86 (1992) where Dodd hunted for young boys he could abduct, rape, and kill. Dodd's crimes and defendant's also are similar with their overtones of sexual compulsion and gratification.

Defendant put three shots into the head of his victim Melinda Mercer and one into the head of Connie Ellis. This case presents facts that are at least as vicious and brutal as others[35] in which the death penalty was imposed.

The disturbing nature of defendant's crimes places them squarely within the class of cases in which Washington juries have sentenced defendants to death.

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[35] See Report of the Trial Judge (TR) for: M. Rupe, No. 7 (single gunshot wound to the head, no torture); B.Harris, TR No. 29 (gunshot wounds to the head and neck, no torture, contract killing) G. Benn, No. 75 (gunshot wounds to the head and trunk, no torture).

iii. Criminal history.

Defendant's death sentence is not disproportionate when his criminal history is considered. Defendant's criminal history consisted of fourteen felony convictions comprised of thirteen convictions for murder in the first degree and one count of attempted murder in the first degree. Ex. 700; RP 7719; Report of the Trial Judge No. 251. The State can find no other similar case where the defendant had so many prior convictions for murder.

In the pool of similar cases, only a small number of other defendants had a prior conviction for murder or manslaughter: 1) State v. Vidal, 82 Wn.2d 74, 508 P.2d 158 (1973) (two murders); 2) State v. Braun, 82 Wn.2d 157, 509 P.2d 742 (1973) (each defendant had a prior murder conviction); 3) R. Hughes, TR no. 23 (murder); 4) B. Harris, TR no. 29 (manslaughter); 5) C. Harris, TR no. 38 (murder); 6) D. Williams, TR no. 44 (murder); 7) P. St. Pierre, TR no. 34 (murder); 8) B. Lord, TR no. 47 (murder); 9) J. Gentry, TR no. 119 (manslaughter); 10) C. Finch, TR no. 154 (manslaughter); 11) M. Roberts, TR no. 176 (murder); 12) D. Smith, TR no. 191 (murder); 13) J. Elledge, TR no. 183 (murder). Over half of these defendants were sentenced to death - Vidal, Braun, B. Harris, Lord, Gentry, Finch, Roberts, and Elledge. No one has had more than two convictions for murder, much less thirteen murder convictions.

Defendant's criminal history is ***the most extensive of any within the pool of similar cases.*** It shows a long pattern of violence towards

others. See State v. Brown, 132 Wn.2d 529, 559, 940 P.2d 546 (1997). This factor must weigh very heavily with the court in finding that defendant' death sentence was not disproportionately imposed.

iv. Personal history.

Defendant was approximately 45 and 46 when he committed these crimes. The subjective factors in defendant's personal history are not sufficient to override the circumstances and consequences of his crime. Defendant had by all accounts a very happy childhood and a very stable and loving family. He had steady employ and very highly developed skills as a pilot. Defendant's mitigation evidence focused on his good behavior in the jail, his religious conversion after arrest, and his desire to minister to others. No evidence was presented to explain why or how someone raised with so many advantages turned into a repeated killer.

These facts regarding personal history are very similar in nature to those presented in State v. Stenson, 132 Wn.2d 668, 760, 940 P.2d 1239 (1997). There this court concluded:

> Stenson was not lacking in normal intelligence, was not youthful, and was not the victim of a tragic background. We have compared this case and all the circumstances of the Defendant and his crime with other first degree aggravated murders which have and have not received the death penalty. Given the brutal, calculated nature of the crimes, the motivation of financial gain, and the lack of mitigating circumstances, we conclude the sentence was neither excessive nor disproportionate.

Id. These same comments apply to Mr. Yates. The factors employed by this court in considering both the crime and the defendant justify the conclusion that defendant's case is sufficiently similar to other cases in which the death penalty has been imposed and upheld on appeal.

c. The verdict did not result from passion or prejudice.

The jurors were instructed that they were not to be influenced by passion, prejudice, or sympathy. RP 8204; CP 1788, penalty phase inst. no. 1. Nothing in the record even hints that they disregarded this instruction. See State v. Sagastegui, 135 Wn.2d 67, 94-95, 954 P.2d 1311 (1998).

Defendant attempts to suggest that the jury's passions were somehow inflamed by the argument of the prosecutor in the penalty phase. The propriety of the prosecution argument was addressed in the earlier section of the brief dealing with claims of prosecutorial misconduct. It is important to note that defendant alleged that only one of the arguments in the penalty phase was an improper appeal to passion and prejudice. Appellant's brief at pp 195-196. As stated earlier, the court sustained the objection to that argument and immediately instructed the jury to disregard it. RP 8300. Any prejudice stemming from this argument was eliminated in the trial court by its prompt response. Defendant has failed to identify

any other basis for finding the verdict was the result of passion and prejudice.

d. Defendant makes no claim that he is mentally retarded.

RCW 10.95.030(2) provides that no person who is mentally retarded shall be executed. The statute further provides that when a defendant contends that he is mentally retarded so as to prohibit execution, the defense bears the burden to prove mental retardation by a preponderance of evidence. In addition, the law imposes the duty upon the trial court to make a finding as to the existence of mental retardation. To be considered mentally retarded under the statute a person must have a "significantly subaverage intellectual functioning," which is defined as an IQ of 70 or below. Davis, 141 Wn.2d at 886-887. In this case, defendant did not assert that he was mentally retarded within the meaning of RCW 10.95.030. Defendant's inaction below constitutes waiver of any claim that he was mentally retarded. Moreover, the record indicates that there is no concern in this regard. Defendant was an extremely intelligent man with highly developed skills as a helicopter pilot.

After considering all the questions posed by mandatory review, this court should affirm the sentence of death in this case.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this court to affirm the convictions and sentence below.

DATED: March 31, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

DONNA MASUMOTO
Deputy Prosecuting Attorney
WSP #19700

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/31/06 [signature]
Date Signature

APPENDIX "A"

Findings of Fact and Conclusions of Law

ORIGINAL

00-1-03253-8 16493868 FNFCL 04-17-02

FILED
DEPT. 11
IN OPEN COURT
APR 16 2002
Pierce County Clerk
By..... DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON Plaintiff vs. ROBERT LEE YATES, JR. Defendant	No. 00-1-03253-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: MOTION FOR EQUITABLE ESTOPPEL

On March 7, 2002 defendant Robert Lee Yates, Jr. through his attorneys Mary Kay High and Roger Hunko, appeared before visiting Superior Court Judge Gordon L. Godfrey for the motion for equitable estoppel and preclusion of the death penalty. The State was represented by Pierce County Prosecuting Attorney Gerald A. Horne through his deputies Gerald Costello and Barbara Corey-Boulet. The defendant, being present, was represented by Attorneys Mary Kay High and Roger Hunko. The court having heard testimony and considered the written and oral arguments of counsel, now makes and enters these:

FINDINGS OF FACT

1. On or about April 19, 2000 the defendant Mr. Robert Lee Yates Jr. was arrested and charged with one count of the murder of Jennifer Joseph. He was immediately appointed counsel through the offices of the Spokane County Public Defense. Attorney Richard Fasy undertook the representation of the defendant on behalf of that office.

1. On May 18, 2000, defendant was charged in Spokane County Superior Court with eight counts of aggravated murder for the deaths of Ms. Joseph, Scott, Johnson, Wasson,

McClenahan, Oster, Maybin, and Durning. Additionally he was charged with one count of attempted first degree murder and one count of attempted first degree robbery of Ms. Smith.

2. On behalf of defendant, Mr. Fasy began to pursue the possibility of "global resolution" discussions with the Spokane County Prosecuting Attorneys Office. It began as a "what if" approach. Towards the end of June it became more "concrete". The purpose was to bring about a resolution short of the death penalty. He would not provide information without assurances as to the detriment of his client. The window of time for these discussions was June 28 to July 17, 2000.

3. At the Washington State Prosecuting Attorneys Summer Conference in Chelan Washington between June 13-16, 2000 Mr. Tucker and other state prosecuting attorneys, including former Pierce County Prosecuting Attorney John W. Ladenburg, had an informal conversation about this defendants case. Based on the conversations at that meeting with the prosecuting attorneys, including John W. Ladenburg, and based on the prosecutorial protocol of handling multi-venue prosecutions in one venue, Mr. Tucker believed and had reason to believe that he had the authority to prosecute the Pierce County murders of Melinda Mercer and Connie LaFontaine Ellis that are the subject matter of this hearing. Mr. Tucker subsequently conveyed that understanding to defense counsel, Mr. Fasy.

4. When it became apparent to the Pierce County Prosecutors Office that Mr Tucker was anticipating plea negotiations which included the possible elimination of the death penalty a phone conference was arranged between Mr Tucker, Mr. Ladenburg, and other death penalty familiar prosecutors including but not limited to King County Prosecutor Norm Maleng and Yakima Prosecuting Attorney Jeff Sullivan. Discussions included the problems posed with the prosecution, that DNA results were not back, philosophical positions of plea bargaining the death penalty at this stage of a proceeding, and other unstated issues. During that call, Mr. Ladenburg expressed his disapproval of Mr. Tucker's suggestion that he might plea bargain the death penalty in this case at this juncture. Mr. Ladenburg also told Mr. Tucker that if he was considering plea bargaining the death penalty Mr. Ladenburg would not allow Mr. Tucker to handle the Pierce County cases. During this phone call Mr. Ladenburg revoked any and all authority implied or otherwise that he had given to Mr. Tucker to prosecute or plea bargain the Pierce County murder cases that are the subject of this matter.

5. During the course of plea negotiations in Spokane during May and June, 2000, defendant through his attorney Mr. Fasy offered to plead guilty to the two Walla Walla murders and the Skagit County murder as well as to disclose the location of the remains of Melody Murfin of Spokane.

a. Defendant never provided any written statements or other substantive evidence relevant to the Walla Walla and Skagit County murders. Mr. Tucker and police investigators who are familiar with those cases agree that those cases were weak in evidence and would not have been prosecutable.

b. Defendant took a polygraph which was arranged by Mr. Fasy. The polygraph test evaluated defendant's truthfulness regarding the content of a handwritten statement that defendant wrote and provided to the polygrapher regarding his crimes. That handwritten statement has never been provided to police or prosecutors who remain unaware of its content.

6. On July 1, 2000 Mr. Tucker made the decision to proceed with a plea agreement with the defendant and started the process of putting together a plea agreement. Prior to July 13, 2000, Mr. Tucker and Mr. Fasy drafted a proposed plea bargain agreement which attempted to resolve all murder cases from Spokane, Skagit, Walla Walla, and Pierce counties. On July 13, 2000 Mr. Tucker sent by fax a copy of that "draft" plea bargain to prosecutors from those specific counties including Mr. Ladenburg of Pierce County.

a. The proposed plea bargain required defendant to disclose the location of the remains of Melody Murfin and also to assist police with the location of a .25 caliber handgun that had been used in some of the murders.

b. Defendant did not disclose to the State the location of the remains of Melody Murfin until October 2000, and defendant never provided any assistance in the location of the .25 caliber handgun, which to date has not yet been recovered.

7. On Sunday, July 16, 2000, Mr. Tucker sent via fax a letter to Mr. Ladenburg requesting written authorization to file the Pierce County cases in Spokane County.

8. On Monday, July 17, 2000, Mr. Ladenburg sent a letter to Mr. Tucker stating that Pierce County would file its own cases in Pierce County. Mr. Ladenburg also left a voice message to that effect. Mr. Ladenburg's office on or about that date filed the Pierce County charges with the murders of Melinda Mercer and Connie LaFontaine Ellis.

9. Following the filing of the Pierce County charge Mr. Fasy and Mr. Tucker continued to negociate a plea agreement exclusive of the Pierce county charges.

10. On October 13, 2000, defendant entered into a plea agreement with the Spokane County Prosecuting Attorney. In exchange for the State's decision in those specific cases filed in Spokane county not to seek the death penalty, defendant agreed to plea guilty to those relevant first degree murders and one attempted first degree murder in Spokane County, two first degree murders from Walla Walla County, and one first degree murder from Skagit County.

11. On October 16, 2000, the Spokane County Superior Court accepted defendant's guilty plea to the specific cases filed on behalf of Spokane, Walla Walla, and Skajit counties. The record is absent of any actions by the defendant at that proceeding alleging any violations of a plea agreement and/or that plea agreement, any detrimental reliance in plea negociations, voluntariness of his plea, prosecutorial misconduct, or any other matters relevant to this proceeding. The record is further absent of any actions taken by the prosecution in the Spokane plea to appraise the Spokane Superior Court of any objections to or comments by the victims of the Pierce county slaying as required pursuant to RCW 9.94A.030 (37), 9.94A.080, and 9.94A.090.

12. Defendant to date has not pursued any post-conviction motion in Spokane County Superior Court challenging his guilty plea or challenging the application of his plea agreement.

CONCLUSIONS OF LAW

1. The defendant has failed to prove by clear, cogent, and convincing evidence that the doctrine of equitable estoppel should apply to the plea bargaining in this case.

2. Defendant has failed to establish that a manifest injustice has occurred and that the application of the doctrine would not hinder or impair a governmental purpose or function. Similarly, defendant has failed to prove that he was injured in any way by representations made during the course of plea bargaining in Spokane County.

3. Acceptance of a plea bargain is within the specific purview of the trial court. The Superior Court of Spokane County accepted the plea agreement in that specific litigation. Any motion challenging the circumstances of plea bargaining germane to, related to, or relevant to this litigation must have been timely brought in Spokane County Superior Court pursuant to CR 4.2 (e), RCW 9.94A.090, and/or any other applicable statute or case law.

4. Application of the doctrine of equitable estoppel to the plea bargaining process as plead and argued by the defense in this matter would severely impair an important government function.

5. Defendant's motion to apply equitable estoppel to preclude the death penalty in the Pierce County aggravated murder trials is denied.

DATED: April 16, 2002

VISITING JUDGE GORDON GODFREY

FILED
DEPT. 11
IN OPEN COURT
APR 16 2002
Pierce County Clerk
By..... DEPUTY

APPENDIX "B"

RCW 36.27.040

§ **36.27.040.** Appointment of deputies -- Special and temporary deputies

The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. Each appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, except that such deputy need not be a resident of the county in which he serves. The prosecuting attorney may appoint one or more special deputy prosecuting attorneys upon a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the prosecuting attorney and filed in the county auditor's office. Such special deputy prosecuting attorney shall be admitted to practice as an attorney before the courts of this state but need not be a resident of the county in which he serves and shall not be under the legal disabilities attendant upon prosecuting attorneys or their deputies except to avoid any conflict of interest with the purpose for which he has been engaged by the prosecuting attorney. The prosecuting attorney shall be responsible for the acts of his deputies and may revoke appointments at will.

Two or more prosecuting attorneys may agree that one or more deputies for any one of them may serve temporarily as deputy for any other of them on terms respecting compensation which are acceptable to said prosecuting attorneys. Any such deputy thus serving shall have the same power in all respects as if he were serving permanently.

The provisions of chapter 39.34 RCW shall not apply to such agreements.

The provisions of RCW 41.56.030(2) shall not be interpreted to permit a prosecuting attorney to alter the at-will relationship established between the prosecuting attorney and his or her appointed deputies by this section for a period of time exceeding his or her term of office. Neither shall the provisions of RCW 41.56.030(2) require a prosecuting attorney to alter the at-will relationship established by this section.

HISTORY: 2000 c 23 § 2; 1975 1st ex.s. c 19 § 2; 1963 c 4 § **36.27.040.** Prior: 1959 c 30 § 1; 1943 c 35 § 1; 1903 c 7 § 1; 1891 c 55 § 6; 1886 p 63 § 17; 1883 p 76 § 23; Code 1881 § 2142; 1879 p 95 § 16; Rem. Supp. 1943 § 115.

APPENDIX "C"

RCW 10.95.010

§ 10.95.010. Court rules

No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

HISTORY: 1981 c 138 § 1.

§ 10.95.020. Definition

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(§ 10.95.020 continued)

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

HISTORY: 2003 c 53 § 96; 1998 c 305 § 1. Prior: 1995 c 129 § 17 (Initiative Measure No. 159); 1994 c 121 § 3; 1981 c 138 § 2.

§ 10.95.030. Sentences for aggravated first degree murder

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(§ 10.95.030 continued)

(a) "Mentally retarded" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

HISTORY: 1993 c 479 § 1; 1981 c 138 § 3.

§ 10.95.040. Special sentencing proceeding -- Notice -- Filing -- Service

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

HISTORY: 1981 c 138 § 4.

§ 10.95.050. Special sentencing proceeding -- When held -- Jury to decide matters presented -- Waiver -- Reconvening same jury -- Impanelling new jury -- Peremptory challenges

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(§ 10.95.050. continued)

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

HISTORY: 1981 c 138 § 5.

§ 10.95.060. Special sentencing proceeding -- Jury instructions -- Opening statements -- Evidence -- Arguments -- Question for jury

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

HISTORY: 1981 c 138 § 6.

§ 10.95.070. Special sentencing proceeding -- Factors which jury may consider in deciding whether leniency merited

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

HISTORY: 1993 c 479 § 2; 1981 c 138 § 7.

§ 10.95.080. When sentence to death or sentence to life imprisonment shall be imposed

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

HISTORY: 1981 c 138 § 8.

§ 10.95.090. Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).

HISTORY: 1981 c 138 § 9.

§ 10.95.100. Mandatory review of death sentence by supreme court -- Notice -- Transmittal -- Contents of notice -- Jurisdiction

Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by chapter 138, Laws of 1981.

HISTORY: 1981 c 138 § 10.

§ 10.95.110. Verbatim report of trial proceedings -- Preparation -- Transmittal to supreme court -- Clerk's papers -- Receipt

(1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

HISTORY: 1981 c 138 § 11.

§ 10.95.120. Information report -- Form -- Contents -- Submission to supreme court, defendant, prosecuting attorney

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(§ 10.95.120 continued)

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in RCW 10.95.070;

(e) The jury's answer to the question posed in RCW 10.95.060(4);

(f) The sentence imposed.

(§ 10.95.120 continued)

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(§ 10.95.120 continued)

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

HISTORY: 1981 c 138 § 12.

§ 10.95.130. Questions posed for determination by Supreme Court in death sentence review -- Review in addition to appeal -- Consolidation of review and appeal

(1) The sentence review required by RCW 10.95.100 shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by chapter 138, Laws of 1981, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

(c) Whether the sentence of death was brought about through passion or prejudice; and

(d) Whether the defendant was mentally retarded within the meaning of RCW 10.95.030(2).

HISTORY: 1993 c 479 § 3; 1981 c 138 § 13.

§ 10.95.140. Invalidation of sentence, remand for resentencing -- Affirmation of sentence, remand for execution

Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with RCW 10.95.090 if:

(a) The court makes a negative determination as to the question posed by RCW 10.95.130(2)(a); or

(b) The court makes an affirmative determination as to any of the questions posed by RCW 10.95.130(2) (b), (c), or (d).

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with RCW 10.95.160 if:

(a) The court makes an affirmative determination as to the question posed by RCW 10.95.130(2)(a); and

(b) The court makes a negative determination as to the questions posed by RCW 10.95.130(2) (b), (c), and (d).

HISTORY: 1993 c 479 § 4; 1981 c 138 § 14.

§ 10.95.150. Time limit for appellate review of death sentence and filing opinion

In all cases in which a sentence of death has been imposed, the appellate review, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under RCW 10.95.110. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

HISTORY: 1988 c 202 § 17; 1981 c 138 § 15.

§ 10.95.160. Death warrant -- Issuance -- Form -- Time for execution of judgment and sentence

(1) If a death sentence is affirmed and the case remanded to the trial court as provided in RCW 10.95.140(2), a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

(2) If the date set for execution under subsection (1) of this section is stayed by a court of competent jurisdiction for any reason, the new execution date is automatically set at thirty judicial days after the entry of an order of termination or vacation of the stay by such court unless the court invalidates the conviction, sentence, or remands for further judicial proceedings. The presence of the inmate under sentence of death shall not be required for the court to vacate or terminate the stay according to this section.

HISTORY: 1990 c 263 § 1; 1981 c 138 § 16.

§ 10.95.170. Imprisonment of defendant

The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in RCW 10.95.160. During such period of imprisonment, the defendant shall be confined in the segregation unit, where the defendant may be confined with other prisoners not under sentence of death, but prisoners under sentence of death shall be assigned to single-person cells.

HISTORY: 1983 c 255 § 1; 1981 c 138 § 17.

§ 10.95.180. Death penalty -- How executed

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

HISTORY: 1996 c 251 § 1; 1986 c 194 § 1; 1981 c 138 § 18.

§ 10.95.185. Witnesses

(1) Not less than twenty days prior to a scheduled execution, judicial officers, law enforcement representatives, media representatives, representatives of the families of the victims, and representatives from the family of the defendant who wish to attend and witness the execution, must submit an application to the superintendent. Such application must designate the relationship and reason for wishing to attend.

(2) Not less than fifteen days prior to the scheduled execution, the superintendent shall designate the total number of individuals who will be allowed to attend and witness the planned execution. The superintendent shall determine the number of witnesses that will be allowed in each of the following categories:

(a) No less than five media representatives with consideration to be given to news organizations serving communities affected by the crimes or by the commission of the execution of the defendant.

(b) Judicial officers.

(c) Representatives of the families of the victims.

(d) Representatives from the family of the defendant.

(e) Up to two law enforcement representatives. The chief executive officer of the agency that investigated the crime shall designate the law enforcement representatives.

After the list is composed, the superintendent shall serve this list on all parties who have submitted an application pursuant to this section. The superintendent shall develop and implement procedures to determine the persons within each of the categories listed in this subsection who will be allowed to attend and witness the execution.

(§ 10.95.185 continued)

(3) Not less than ten days prior to the scheduled execution, the superintendent shall file the witness list with the superior court from which the conviction and death warrant was issued with a petition asking that the court enter an order certifying this list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than five days after the filing of the petition.

(4) Unless a show cause petition is filed with the superior court from which the conviction and death warrant was issued within five days of the filing of the superintendent's petition, the superintendent's list, by order of the superior court, becomes final, and no other party has standing to challenge its appropriateness.

(5) In no case may the superintendent or the superior court order or allow more than seventeen individuals other than required staff to witness a planned execution.

(6) All witnesses must adhere to the search and security provisions of the department of corrections' policy regarding the witnessing of an execution.

(7) The superior court from which the conviction and death warrant was issued is the exclusive court for seeking judicial process for the privilege of attending and witnessing an execution.

(8) For purposes of this section:

(a) "Judicial officer" means: (i) The superior court judge who signed the death warrant issued pursuant to RCW 10.95.160 for the execution of the individual, (ii) the current prosecuting attorney or a deputy prosecuting attorney of the county from which the final judgment and sentence and death warrant were issued, and (iii) the most recent attorney of record representing the individual sentenced to death.

(b) "Law enforcement representatives" means those law enforcement officers responsible for investigating the crime for which the defendant was sentenced to death.

(c) "Media representatives" means representatives from news organizations of all forms of media serving the state.

(d) "Representatives of the families of the victims" means representatives from the immediate families of the victim(s) of the individual sentenced to death, including victim advocates of the immediate family members. Victim advocates shall include any person working or volunteering for a recognized victim advocacy group or a prosecutor-based or law enforcement-based agency on behalf of victims or witnesses.

(e) "Representative from the family of the defendant" means a representative from the immediate family of the individual sentenced to death.

(f) "Superintendent" means the superintendent of the Washington state penitentiary.

HISTORY: 1999 c 332 § 1; 1993 c 463 § 2.

§ 10.95.190. Death warrant -- Record -- Return to trial court

(1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(§ 10.95.190 continued)
(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

HISTORY: 1981 c 138 § 19.

§ 10.95.200. Proceedings for failure to execute on day named

Whenever the day appointed for the execution of a defendant shall have passed, from any cause, other than the issuance of a stay by a court of competent jurisdiction, without the execution of such defendant having occurred, the trial court which issued the original death warrant shall issue a new death warrant in accordance with RCW 10.95.160. The defendant's presence before the court is not required. However, nothing in this section shall be construed as restricting the defendant's right to be represented by counsel in connection with issuance of a new death warrant.

HISTORY: 1990 c 263 § 2; 1987 c 286 § 1; 1981 c 138 § 20.

§ 10.95.900. Severability -- 1981 c 138

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

HISTORY: 1981 c 138 § 22.

APPENDIX "D"

Evidence Rule 404

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

HISTORY: (Adopted Dec. 19, 1978, effective April 2, 1979; amended June 4, 1992, effective Sept. 1, 1992.)

APPENDIX "E"

Proposed Jury Instruction No. 7

No. 7

In order to prove "common scheme or plan" there must be a nexus between the killings that goes beyond the mere firing of the fatal shots. The term "common scheme or plan" refers to a larger criminal design of which the charged crime is only a part. To prove the existence of this aggravating circumstance the state bears the burden of proving beyond a reasonable doubt that the killings must be connected by a larger criminal plan.

Washington v. Finch 975 P.2d 967, 944 (1994)
Benn v. Lambert, No. 00-99014 (9th Cir, 2002)

APPENDIX "F"

RCW 9.94A.589

§ **9.94A.589.** Consecutive or concurrent sentences

(1) (a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2) (a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

HISTORY: 2002 c 175 § 7; 2000 c 28 § 14; 1999 c 352 § 11; 1998 c 235 § 2; 1996 c 199 § 3; 1995 c 167 § 2; 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.

APPENDIX "G"

RCW 9.94A.525

§ **9.94A.525.** Offender score

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2) Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction. This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5) (a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589 (1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11) or (12) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), or (12) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction.

(12) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(13) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(14) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2

point.

(15) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(16) If the present conviction is for a sex offense, count priors as in subsections (7) through (15) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(17) If the present conviction is for an offense committed while the offender was under community placement, add one point.

(18) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Accordingly, prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions.

HISTORY: 2002 c 290 § 3; 2002 c 107 § 3; 2001 c 264 § 5; 2000 c 28 § 15. Prior: 1999 c 352 § 10; 1999 c 331 § 1; 1998 c 211 § 4; 1997 c 338 § 5; prior: 1995 c 316 § 1; 1995 c 101 § 1; prior: 1992 c 145 § 10; 1992 c 75 § 4; 1990 c 3 § 706; 1989 c 271 § 103; prior: 1988 c 157 § 3; 1988 c 153 § 12; 1987 c 456 § 4; 1986 c 257 § 25; 1984 c 209 § 19; 1983 c 115 § 7. Formerly RCW 9.94A.360.

APPENDIX "H"

Washington State Death Penalty Statistics

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THE WASHINGTON STATE DEATH PENALTY

- The death penalty became part of Washington territorial law in1854.
- The first degree murder sentence was changed in 1869 and again in 1909.
- It was abolished in 1913.
- It was reinstated in 1919. It remained unchanged until 1975.
- In 1975, the death penalty was abolished (1). Later in 1975, the people of Washington voted for an automatic mandatory death penalty for "Aggravated Murder in the First Degree".
- In 1977, Legislature enacted RCW 10.94 This replaced the mandatory sentence and gave detailed procedures for imposing the death penalty.
- The 1977 law was declared unconstitutional by the Washington Supreme Court (2), because a person who pled not guilty and was subject to jury trial might receive the death penalty, while one who pled guilty could only receive a maximum sentence of life imprisonment without possibility of parole.
- In 1981, the Washington Legislature voted for a new capital punishment law under RCW Chapter 10.95. This law did not have the constitutional defects of the 1977 law. It is the current law.

OTHER FACTS :

- RCW 10.95.180 establishes the procedures for carrying out the death penalty in Washington State.
- The Washington State Penitentiary is the facility where executions are carried out.
- Males under the sentence of death are housed at the Penitentiary. Females subject to the death penalty are housed at the Washington Corrections Center for Women.
- The Secretary of the Department of Corrections designates the Deputy Secretary, Office of Correctional Operations to coordinate the responsibilities of the Washington State Penitentiary Superintendent. The Superintendent is responsible for supervising the activities required to carry out

the execution.

- As of June 6, 1996, execution in Washington State is carried out by lethal injection, unless the defendant chooses hanging. (4)
- Since 1904, there have been 77 executions in Washington State. The most recent execution for the crime of first degree murder was on August 28, 2001. The executed inmate, James H. Elledge, was 58 years old at the time of death.

The ethnic breakdown of Washington State executions is as follows:

- Caucasian - 65
- Black - 7
- Asian - 2
- Eskimo - 1
- Hispanic - 2

1. Wash. Crim. Code Act of 1975, Ch. 260, §9A.92.010 (125), 1975 Wash. Laws 1st Ex. Sess. 817, 862).

2. State v. Frampton, Wn 2nd 469, 627 P. 2d 922 (1981)

3. United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); State v. Martin, 94 Wn. 2d 1, 614 P. 2d 164 (1980).

4. Senate Bill 5500, Chapter 251 Law of 1996, amended RCW 10.95.180, Death Penalty How Executed, modified the method of execution.

CURRENT INMATES SUBJECT TO THE WASHINGTON STATE DEATH PENALTY:

1. JONATHAN L. GENTRY convicted in 1991 of fatally bludgeoning 12-year-old Cassie Holden near Bremerton.
2. CAL COBURN BROWN convicted December 10, 1993 for the stabbing and strangulation death of Holly Washa.
3. DAROLD RAY STENSEN convicted August 11, 1994 for the shooting deaths of his wife, Denise Ann Stenson, and his business partner, Frank Clement Hoerner on March 25, 1993 in Clallam County.
4. CLARK RICHARD ELMORE was convicted July 6, 1995 of one count of aggravated first degree murder and one count of Rape in the Second Degree for the rape and murder of the 14-year old daughter of his live-in girlfriend in Whatcom County.
5. DWAYNE L. WOODS was convicted on June 20, 1997 of two counts of aggravated first degree murder for the murders of Telisha Shaver and Jade Moore.
6. DAYVA CROSS convicted 6/22/01 in King County for the stabbing

deaths of his wife Anouchka Baldwin (37) and stepdaughters Amanda Baldwin (15) and Salome Holle (18).

7. EUGENE ALLEN GREGORY convicted 3/22/01 in Pierce County of one count aggravated first degree murder for the stabbing death of his neighbor Geneine Harshfield.
8. ROBERT LEE YATES JR. convicted 10/4/02 in Pierce County of murdering Melinda Mercer, 24, in 1997 and Connie LaFontaine Ellis, 35, in 1998.

PERSONS EXECUTED SINCE 1904

Since 1904, the state has executed 76 people, the youngest being 17 and the oldest being 63. Between 1913 and 1919 the death penalty was abolished, but was re-established and remained unchanged for 56 years.

Use this link for list of persons executed in Washington since 1904.

APPENDIX "I"

Persons Executed

Persons Executed Since 1904 in Washington State

The Death Penalty
Execution Procedures and Assignments Checklist (pdf)
Capital Punishment RCW (off-site link)
Capital Punishment Policy (pdf)
Washington State Attorney General's Capital Punishment Litigation Web Site Pag

NAME	EXECUTED	RACE	AGE	OCCUPATION	COUNTY
CHAMPOUX, James	5/6/1904	Cau.	28	Farmer	King
CLARKE, Charles	9/2/1904	Cau.	26	Sash & Door Mkr	Thurston
ARAO, H.	6/3/1905	Asian	28	Tailor	Spokane
PASQUALIE, Frank	9/15/1905	Cau.	28	Laborer	Pierce
McPHAIL, Angus J.	12/8/1905	Cau.	45	Woodsman	Snohomish
WHITE, William	3/2/1906	Cau.	18	Sailor	King
BROOKS, Simon	5/13/1906	Cau.	46	Laborer	Clark
ARMSTRONG, A.A.	6/8/1906	Cau.	53	Farmer	Lewis
MILLER, Fred	3/22/1907	Cau.	25	Woodsman	Cowlitz
NICULAS, Joe	4/16/1909	Cau.	22	Laborer	Kitsap
GAUVIETTE, Joseph M.	8/27/1909	Cau.	44	Plumber	Spokane
BARNES, Hezekiah W.	11/12/1909	Cau	28	Laborer	Walla Walla
QUINN, Richard	5/13/1910	Cau.	32	Laborer	Snohomish
BARKER, Frank	6/20/1910	Cau.	23	Teamster	Spokane
JOHNS, Frederick Wm.	4/21/1911	Cau.	63	Machinist	Stevens
SMITH, John	4/1/1921	Cau.	26	Laborer	King
MAHONEY, James E.	12/1/1922	Cau.	38	Railroad	King
WHITFIELD, George E	6/13/1924	Cau.	22	Laborer	Clark
WALLER, Ralph	6/27/1924	Cau.	34	Miner	Garfield
WALTON, Thomas	12/12/1924	Cau.	39	Barber	Spokane
MOSLEY, L.E.	2/19/1926	Black	45	Porter	King
WINTERS, Alfred A. aka WILLIAMS, Albert A.	5/27/1927	Black	30	Janitor	Cowlitz
LOPEZ, Manuel	2/15/1928	Hispanic	41	Laborer	Whitman
BAILEY, Emmett	8/10/1928	Cau.	39	Logger	Lewis

GAINES, Wallace C	8/31/1928	Cau.	48	Mining Engineer	King
BAKER, Luther	3/29/1929	Cau.	61	Logger	Clark
CLARK, Preston R.	7/11/1930	Cau.	39	Laborer	Walla Walla
WILKINS, R. L. (Lee)	8/15/1930	Cau.	44	Farmer	Walla Walla
SCHAFFER, Arthur	8/29/1930	Cau.	29	Farmer	Mason
MUCH, Archie Frank	9/12/1930	Cau.	33	Mill Worker	Spokane
MILLER, George	12/18/1931	Cau.	48	Mechanic	Spokane
CARPENTER, Harold	4/15/1932	Cau.	31	Laborer	Thurston
DUBUC, Walter	4/15/1932	Cau.	17	Laborer	Thurston
STRATTON, Ollie Lee	7/28/1933	Cau.	24	Soldier	Jefferson
BRADLEY, Ted	5/11/1934	Cau.	28	Plumber	King
MILLER, Byron	10/3/1934	Cau.	43	Farmer	Yakima
YICK, Hong	7/19/1935	Asian	39	Laborer	King
FLEMING, Barney	4/3/1936	Black	29	Laborer	King
STRINGER, Glenn R.	5/29/1936	Cau.	24	Laborer	Clark
HALL, Leo	9/11/1936	Cau.	34	Mechanic	Kitsap
HAWKINS, Clifford	2/23/1938	Cau.	25	Logger	Skagit
RYAN, Claude H.	2/25/1938	Cau.	34	Farmer	Lewis
KNAPP, Stanley	8/5/1938	Cau.	21	Laborer	Spokane
O'DONNELL, Joseph R.	11/21/1938	Cau.	40	Salesman	King
LEUCH, Bernhard R.	8/4/1939	Cau.	48	None Listed	Mason
BUTTRY, Paul	9/15/1939	Cau.	39	Woodworker	Grays Harbor
TALBOTT, Earl	9/18/1939	Cau.	19	Rancher	Walla Walla
WRIGHT, Roy	10/6/1939	Cau.	19	Cook	Yakima
CARSON, Ralph	12/8/1939	Cau.	54	Const. Worker	Clallam
BOUCHARD, Edward L	9/6/1940	Cau.	46	Decorator	Snohomish
MARABLE, Jack	10/4/1940	Cau.	40	Painter	Thurston
LEWIS, Arley Ovoyd	1/30/1941	Cau	29	Musician	Clark
DAVIS, Denzel	3/24/1941	Cau.	24	Laborer	King
ANDERSON, John Bruce	11/14/1941	Cau.	52	Farmer	Spokane
MONTGOMERY, Chester	3/19/1943	Black	29	Cook	Spokane
JACOBS, Roy Willard	4/6/1943	Cau.	41	None Listed	Pierce

WILLIAMS, Persia	9/8/1944	Black	38	Longshoreman	King
HEBERLING, Edward	12/8/1944	Cau.	32	Laborer	King
BILL, Joe	9/7/1945	Aleut	30	Laborer	King
WESSEL, Joseph B.	1/19/1946	Cau.	44	Sawmill Operator	Pierce
CLARK, Woodrow Wilson	2/5/1946	Cau.	30	Shoemaker	Spokane
CLARK, John Henry	1/7/1947	Black	27	Laborer	King
BIRD, Jake	7/15/1949	Black	47	Laborer	Pierce
PERKINS, Arthur Bruce	11/4/1949	Cau.	24	Cook	Thurston
WILLIAMS, Wayne Leroy	11/18/1949	Cau.	33	Industrial Worker	Snohomish
O'DELL, Wayne	6/18/1951	Cau.	23	Laborer	Whitman
RIO, Grant E.	12/10/1951	Cau.	29	Farm Laborer	Whitman
WILSON, Utah E.	1/3/1953	Cau	22	Laborer	Clark
WILSON, Truman G.	1/3/1953	Cau	26	Barber	Clark
FARLEY, Artell, Jr.	12/15/1956	Cau.	28	Roofer	Pierce
COLLINS, Harvey John	12/3/1957	Cau.	32	Soldier	Pierce
BRODERSON, John Richard	6/25/1960	Cau.	34	Mechanic	Clark
SELF, Joseph Chester	6/20/1963	Cau.	32	Laborer	King
DODD, Westley Allen	1/5/1993	Cau.	31	Retail	Clark
CAMPBELL, Charles R.	5/27/1994	Cau.	39		Snohomish
SAGASTEGUI, Jeremy	10/13/1998	Hisp	27		Benton
ELLEDGE, James H.	8/28/2001	Cau	58	Janitor	Snohomish